



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 273/2022

In the matter between:

TWK AGRICULTURE HOLDINGS (PTY) LTD

APPELLANT

and

**HOOGVELD BOERDERYBELEGGINGS
(PTY) LTD**

FIRST RESPONDENT

CHRISTIAN ARNOLD HIESTERMANN

SECOND RESPONDENT

ARNOLD CHRISTIAN HIESTERMANN

THIRD RESPONDENT

LEON LOUIS HIESTERMANN

FOURTH RESPONDENT

CONRAD HEINRICH HIESTERMANN

FIFTH RESPONDENT

JOHAN CONRAD HIESTERMANN

SIXTH RESPONDENT

ECKARD WERNER HIESTERMANN

SEVENTH RESPONDENT

GUNTER AUGUST REINSTORF

EIGHTH RESPONDENT

GUNTER AUGUST REINSTORF N O**NINTH RESPONDENT**

(In their capacity as trustee of the GA
Reinstorf Trust, IT No. 2149/96)

YVONNE ELFRIEDE REINSTORF N O**TENTH RESPONDENT**

(In their capacity as trustee of the GA
Reinstorf Trust, IT No. 2149/96)

Neutral citation: *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* (273/2022) [2023] ZASCA 63 (5 May 2023)

Coram: PONNAN ADP, MEYER and WEINER JJA and
NHLANGULELA and UNTERHALTER AJJA

Heard: 15 March 2023

Delivered: 5 May 2023

Summary: Appealability – dismissal of an exception – doctrine of finality
– interests of justice – precedent.

ORDER

On appeal from: Mpumalanga Division of the High Court, Middelburg (Mphahlele DJP and Langa and Vukeya JJ, sitting as the court of appeal):

The appeal is struck from the roll.

JUDGMENT

Unterhalter AJA (Ponnan ADP, Meyer and Weiner JJA and Nhlangulela AJA concurring):

Introduction

[1] The respondents instituted an action against the appellant in the Mpumalanga Division of the High Court, Middelburg (the high court). I will refer to the parties as they are cited in the action. The plaintiffs (the respondents in this appeal) are shareholders of the defendant (the appellant). The plaintiffs made the following averments (salient for our purposes) in their particulars of claim:

- (i) On or about 7 January 2019, the defendant gave notice to its shareholders of an annual general meeting;
- (ii) Notice was given of proposed special resolutions to amend the original Memorandum of Incorporation (MOI);
- (iii) On 5 February 2019, the defendant adopted the resolutions to amend the MOI;
- (iv) As a result, the plaintiffs became related parties in terms of the amended MOI;

- (v) This materially and adversely affected the preferences, rights, limitations, and other terms of the plaintiffs' shares;
- (vi) After complying with the formalities required by s 164 of the Companies Act 71 of 2008 (the Companies Act), the plaintiffs demanded that the defendant pay the fair value of the plaintiffs' shares in the defendant, being the fair value as at the date immediately prior to the adoption of the amended MOI;
- (vii) The defendant declined to do so;
- (viii) The plaintiffs sought payment from the defendant of R120.00 per share held by the plaintiffs, alternatively, a determination of the fair value of the plaintiffs' shares and payment of the value so determined.

[2] The plaintiffs' cause of action is based on appraisal rights, a remedy introduced into our company law in terms of s 164 read with s 37(8) of the Companies Act. I refer to this cause of action as 'the appraisal remedy'.

[3] The defendant gave notice to the plaintiffs to remove its cause of complaint concerning the plaintiffs' cause of action. The plaintiffs amended their particulars of claim in response to the defendant's notice. The defendant was not content. It then excepted to the plaintiffs' amended particulars of claim.

[4] Two grounds of exception (relevant for our purposes) were taken by the defendant. First, the defendant complained that there is no cause of action to secure an appraisal remedy, unless the company has more than one class of shares. The amended particulars of claim aver that the defendant has a single class of shares. The amended particulars thus lack averments necessary to sustain an action. I refer to this exception as 'the class exception'.

[5] Second, the plaintiffs' claim is based on the averment that the adoption of the amended MOI caused the plaintiffs to become related to each other. The defendant styles this 'the Deemed Relatedness'. The Deemed Relatedness, the defendant complains, does not have a material and adverse effect on the preferences, rights, limitations, interests and other terms of the shares in the defendant, but, at worst, upon the persons who happen to own those shares. On this ground also, the amended particulars of claim are said by the defendant to lack averments necessary to sustain a cause of action because the appraisal remedy requires a material and adverse effect on the shares, and not merely upon the persons who own those shares. I refer to this exception as 'the relatedness exception'.

[6] Van Rensburg AJ in the high court upheld the exceptions. The plaintiffs, with the leave of the high court, appealed to the full court of the Mpumalanga Division of the High Court, Middelburg, *per* Langa J with Vukeya J and Mphahlele DJP (the full court). The full court upheld the appeal and dismissed both the class exception and the relatedness exception. With special leave, the defendant appeals to this Court. The fact that leave to appeal has been granted upon application to the President of this Court is not decisive of whether a case meets the criteria for special leave.¹ It still remains for us to consider whether we should entertain the appeal at all.²

Appealability

[7] Before the full court, it was not contentious that the plaintiffs were entitled to appeal the orders of the high court. The high court upheld both the class

¹ See *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 561E-F.

² *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* [2011] ZASCA 74; [2011] 11 BLLR 1041 (SCA); (2011) 32 ILJ 1618 (SCA) para 15.

exception and the relatedness exception. It has long been our law that where an exception is granted on the basis that a plaintiff's particulars of claim fail to disclose a cause of action, and 'the order is fatal to the claim *as pleaded* and therefore final in its effect',³ such an order is appealable. The class exception and the relatedness exception strike at the validity of the plaintiffs' claim. Absent an appeal, the high court had spoken the final word on these matters, and the plaintiffs could not further pursue their claim for an appraisal remedy, as pleaded. The full court correctly found that the class exception and the relatedness exception were appealable. The full court, having entertained the appeal, then reversed the high court's order, and dismissed the exceptions.

[8] Before this Court, the question is different. It is this: Is the full court's order dismissing the exceptions appealable to this Court? The parties were requested to consider this question and to file supplementary heads of argument, more especially in the light of the holding of this Court in *Maize Board*.⁴ This they did.

[9] A long line of cases, stretching back to *Blaauwbosch*,⁵ has consistently held, save in very limited circumstances, that the dismissal of an exception is not appealable. The basis of this holding is that such an order is not final in effect because there is nothing to prevent the same law points being argued at the trial. As Innes CJ put the matter, ' . . . though the Court is hardly likely to change its mind there is no legal obstacle to its doing so upon a consideration of fresh argument and further authority'.⁶

³ *Trope and Others v South African Reserve Bank* [1993] 2 All SA 278 (A); 1993 (3) SA 264 (A) at 270G, citing *Liquidators, Myburgh, Krone & Co Ltd v Standard Bank of South Africa Ltd and Another* 1924 AD 226 at 229.

⁴ *Maize Board v Tiger Oats Ltd and Others* [2002] 3 All SA 593 (A); 2002 (5) SA 365 (SCA).

⁵ *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 601.

⁶ *Idem*.

[10] The issue was considered again by this Court in *Maize Board*. It affirmed the position in our law. It framed the principle thus:

‘In the light of this Court’s interpretation of s 20, the decisions in *Blaauwbosch*, *Wellington* and *Kett*, and the well-established principle that this Court will not readily depart from its previous decisions, it now has to be accepted that a dismissal of an exception (save an exception to the jurisdiction of the court), presented and argued as nothing other than an exception, does not finally dispose of the issue raised by the exception, and is not appealable. Such acceptance would on the present state of the law and the jurisprudence of this Court create certainty and accordingly be in the best interests of litigating parties.’⁷

Maize Board has been followed in a long line of cases.⁸

[11] Faced with this authority of considerable pedigree, counsel for the defendant made the following submissions. First, *Maize Board* recognised that the rule it affirmed was not immutable. That recognition was enhanced by the *dictum* in *Really Useful Investments*.⁹ There, the following appears, ‘[w]here it is incontrovertible on the papers that the effect of the exception is, so to speak, the last word on the subject, the dismissal of an exception is appealable’.¹⁰

[12] Second, it was submitted that the holding in *Maize Board* was closely connected to the distinction in s 20 of the Supreme Court Act 59 of 1959 between a judgment or order that was appealable, and a ruling, that was not. There were three attributes of a judgment or order, authoritatively stated in *Zweni*:¹¹ final in effect and not susceptible of alteration by the court of first instance; definitive of the rights of the parties, that is, the order must grant definitive and distinct relief; and,

⁷ *Maize Board* para 14.

⁸ See *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA) para 22.

⁹ *Minister of Water and Environmental Affairs and Another v Really Useful Investments No 219 (Pty) Ltd* [2016] ZASCA 156; [2017] 1 All SA 14 (SCA); 2017 (1) SA 505 (SCA) para 2.

¹⁰ *Idem*.

¹¹ *Zweni v Minister of Law and Order* [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A).

the order must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. However, so it was argued, the *Zweni* trinity was subject to relaxation by recourse to the interests of justice, even when the Supreme Court Act was in force.¹²

[13] Third, that appealability is ultimately decided by recourse to the interests of justice has gained ascendancy by reason of s 18(2) of the Superior Courts Act 10 of 2013, which recognises that an interlocutory order may be the subject of an appeal. This statutory endorsement has been reinforced by recent decisions of this Court. In *Gun Owners*,¹³ it was said that the *Zweni* test has been subsumed under the ‘broader constitutional “interests of justice” standard. What the interests of justice require depends on the facts of a particular case. This standard applies both to appealability and the grant of leave to appeal, no matter what pre-Constitution common law impediments might exist’.¹⁴ *Gun Owners* was an appeal against the grant of an urgent interim interdict, and its holding on appealability is, the defendant argues, of a piece with the jurisprudence of the Constitutional Court.¹⁵ In sum, the lineage of the rule from *Blaauwbosch* to *Maize Board*, though based on considerations that remain relevant, must ultimately yield to the overarching criterion of the interests of justice.

[14] Fourth, applying the test for appealability, so understood, five reasons support the conclusion that the dismissal of the exceptions by the full court is

¹² *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; [2010] 1 All SA 459 (SCA); 2010 (2) SA 573 (SCA) para 20.

¹³ *National Commissioner of Police and Another v Gun Owners of South Africa* [2020] ZASCA 88; [2020] 4 All SA 1 (SCA); 2020 (6) SA 69 (SCA) para 15.

¹⁴ *Idem*.

¹⁵ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (11) BCLR 1148 (CC); 2012 (6) SA 223 (CC); *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC).

appealable. The first reason is that the exceptions turn on a proper interpretation of the Companies Act. No evidence led at trial will change the interpretation of the relevant provisions of the Companies Act given by the full court.

[15] The second reason is that the trial judge is bound by the interpretation given by the full court to s 164 of the Companies Act. The decision of the full court may not render the matter *res judicata*, but adherence to precedent requires the trial judge to follow the full court. The full court has decided the points of law, and the trial before a single judge would thus be a costly, but empty exercise. The better course, in the interests of justice, is for this Court to entertain the appeal, and determine the law, since we are not bound to follow the full court.

[16] The third reason, following the reasoning of the Constitutional Court in *Khumalo*,¹⁶ is that if the appeal were to succeed, it is likely to be determinative of the case. It is unlikely that the plaintiffs would be able to reformulate their case should the class exception and the relatedness exception prevail.

[17] The fourth reason is that the appraisal remedy is a novel aspect of our company law. It has yet to enjoy an authoritative interpretation by this Court. The public interest would be served if this Court were to do so.

[18] Finally, it is said that the defendant has prospects of success on the merits of its exceptions. Its arguments in support of this contention are set out in its heads of argument and were further developed in oral argument before us.

¹⁶ *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) para 11.

[19] I commence with the following question: should this Court determine whether a decision of the high court or a full court is appealable by recourse to the overarching principle of the interests of justice? We were urged to do so for two reasons. First, because the interests of justice figure so prominently in the Constitutional Court's consideration of when it will entertain an appeal, and the adoption by this Court of the principle would lend coherence to the basis upon which a litigant may ascend the judicial hierarchy. Second, there are decisions of this Court, to which I have referred, that have adopted the interests of justice as the ultimate norm that determines whether a decision is appealable to this Court.

[20] I appreciate the normative attraction of the interests of justice, and the place that it has in the Constitution by recourse to which the Constitutional Court decides whether it will hear an appeal. Who would not want decisions to be taken in the interests of justice? The question would seem to answer itself. But we should not lose sight of the founding provisions of the Constitution. Ours is one, sovereign, democratic state founded upon values set out in s 1 of the Constitution. These values include the supremacy of the Constitution and the rule of law. The rule of law requires that the law is ascertainable and meets reasonable standards of certainty. This means that the courts should be cautious to adopt standards for their decisions so porous that a litigant cannot be advised, with any reasonable probability, as to the decision that a court is likely to make.

[21] Whether the decision of a court is appealable is a matter of great importance, both for litigants and for the discharge by an appellate court of its institutional functions. That is why the doctrine of finality has figured so prominently in the jurisprudence of this Court. As a general principle, the high court should bring finality to the matter before it, in the sense laid down in *Zweni*. Only then should

the matter be capable of being appealed to this Court. It allows for the orderly use of the capacity of this Court to hear appeals that warrant its attention. It prevents piecemeal appeals that are often costly and delay the resolution of matters before the high court. It reinforces the duty of the high court to bring matters to an expeditious, and final, conclusion. And it provides criteria so that litigants can determine, with tolerable certainty, whether a matter is appealable. These are the hallmarks of what the rule of law requires.

[22] I do not consider the Superior Courts Act to have supplanted the primacy of *Zweni*. Section 16 of the Superior Courts Act is cast in general terms: ‘an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted’ to either this Court or a full court, as regulated by s 16, read with s 17(6). *Any* decision is not *every* decision. Section 16 determines to which court an appeal lies. It does not define the class of decisions that can be appealed. That is left open, hence the language of ‘any decision’. This Court decides when a decision is appealable.

[23] Section 16 of the Superior Courts Act is entirely consistent with the powers of this Court as set out in s 168 of the Constitution. Section 168(3)(a) of the Constitution provides that this Court may decide appeals ‘in any matter arising from the High Court of South Africa or a court of a status similar to the High Court’. The jurisdiction of this Court is then limited in certain respects. Section 168(3)(b) demarcates the jurisdiction of this Court. It reads thus: ‘The Supreme Court of Appeal may decide only – (i) appeals; (ii) issues connected with appeals; and (iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament’. Here too, one does not have direct recourse to the Constitution to determine which of ‘any matter arising’ should be considered appealable.

[24] The defendant referenced s 18(2) of the Superior Courts Act. It does contemplate that an interlocutory order not having the effect of a final judgment may be the subject of an appeal. Section 18 regulates the suspension of decisions pending an appeal. The scheme of s 18 is simply to allow for different suspension regimes of application to decisions and interlocutory orders. The provision has nothing to say about when an interlocutory order might be appealable. Only that if such an order is sought to be appealed or leave has been given (rightly or wrongly), s 18(2) is the regime of application to the suspension of the order. Section 18 does not overturn this Court's jurisprudence as to when a decision is appealable. Nor does it enthrone the interests of justice as the overarching principle to decide when a matter is appealable.

[25] I recognise that there is thought to be a compelling basis to render this Court's approach to appealability consistent with that of the Constitutional Court. And hence to recognise the interests of justice as the ultimate criterion by reference to which appealability is decided. I consider this to be a misreading of the Constitution. Section 167 of the Constitution constituted the Constitutional Court as the highest court. Section 167(3) sets out matters that the Constitutional Court may, and is thus competent, to decide. The Constitutional Court may decide constitutional matters. This competence was extended, by constitutional amendment, to any other matter, but under the qualification that the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court. The Constitution thereby states a principle of appealability in respect of the Constitutional Court. The Constitution does so also to allow a person to bring a matter directly to the Constitutional Court or by way of direct appeal (s 167(6) of the Constitution). National legislation or the rules of the Constitutional Court must

allow a person to do so in the interests of justice and with the leave of Constitutional Court.

[26] I draw attention to these provisions because the Constitution gives specific treatment to principles that govern appealability to the Constitutional Court. Those principles frame what the Constitutional Court may do, and it is for that Court to decide how these principles are to be applied. The Constitutional Court has developed a sizeable jurisprudence to that end. The interests of justice, as the touchstone of the Constitutional Court's doctrine of appealability, has an institutional justification. The Constitutional Court, as the apex court, needs a highly selective, but flexible, criterion to decide which matters warrant its attention. To discharge its functions as an apex court, the Constitutional Court depends upon this Court carrying out its functions in an orderly fashion. This means that, in general, finality should be brought to decisions that ascend the court hierarchy, so that the Constitutional Court can be highly selective in deciding upon the matters that should be heard by it.

[27] To adopt the interests of justice as the foundational basis upon which this Court decides whether to entertain an appeal would put in place a regime that is both unpredictable and open-ended. It would encourage litigants to persuade the high courts to grant leave, when they still have work to do, failing which, to invite this Court to hear an appeal under the guidance of a standard of commanding imprecision. That would diminish certainty and enhance dysfunction. It would also compromise the freedom with which the Constitutional Court selects the matters it hears from this Court.

[28] Furthermore, there is no constitutional requirement of congruence with the Constitutional Court on questions of appealability, nor does such congruence between this Court and the Constitutional Court have ineluctable institutional value.

[29] Nor, in my view, is it always necessary that there be such congruence. This Court must determine how best it can discharge its constitutional mandate as a court of appeal. One important aspect of that determination is how best this Court may exercise its appellate functions in relation to the decisions of the courts from which appeals lie. For reasons I have explained in paragraph 20, the doctrine of finality, as articulated in *Zweni*, is central to a principled conception of when a matter may be appealed to this Court. That, in turn, permits this Court to discharge its appellate functions to allow the apex court the required freedom to act as a final court of appeal in carefully selected matters.

[30] Even if this is so as a matter of principle, as the defendant's counsel reminded us, a number of decisions of this Court have been willing, with different degrees of separation, to part from *Zweni*, or subsume *Zweni* under the capacious remit of the interests of justice. I do not here essay a general account of appealability. I do affirm, though, that the doctrine of finality must figure as the central principle of consideration when deciding whether a matter is appealable to this Court. Different types of matters arising from the high court may (I put it no higher normatively) warrant some measure of appreciation that goes beyond *Zweni* or may require an exception to its precepts. Any deviation should be clearly defined and justified to provide ascertainable standards consistent with the rule of law. Recent decisions of this Court that may have been tempted into the general

orbit of the interests of justice should now be approached with the gravitational pull of *Zweni*.

[31] We are here concerned with a particular matter: the dismissal of two grounds of exception that go to the heart of the plaintiffs' cause of action. Applying the doctrine of finality, as I have sought to explain, a long line of authority in this Court has held that the dismissal of an exception is not appealable because no legal obstacle stands in the way of the trial court finally deciding the point of law. The dismissal of an exception is simply not a final decision, and until the matter is finally decided, an appeal should not lie to this Court to pre-empt what the high court has yet to bring to finality.

[32] There are principled considerations which support this position. First, this Court owes a duty of comity to the high court. The high court, having dismissed an exception, has not pronounced its last word on the subject. What the high court has decided may be right or wrong. But under the exception procedure, the high court may yet correct itself or confirm its decision on exception. This Court should respect that process.

[33] Second, if, at trial, the high court confirms its view of the law, it will do so after further consideration of the matter, and perhaps, with further reasoning. This is of benefit to this Court, if the matter then comes on appeal. If the trial court should be persuaded that the points of law raised by the defendant are good, and the cause of action is bad, then the high court will have corrected itself, without intervention by this Court. That may or may not cause the plaintiffs to seek leave to appeal. But should the matter come on appeal, this Court will then enjoy the benefit of two judgments of the high court. The one dismissing the exception, the

other of the trial court giving a final judgment dismissing the action. That too is of assistance to this Court.

[34] Third, awaiting the final judgment of the trial court has benefits for the litigants. Sometimes, a true exception on a point of law may dispose of the matter, if the exception is good. Often, however, there are other issues that must go to trial. An exception brings the further exchange of pleadings to a halt. An appeal upon the dismissal of an exception adds to the delay. If the dismissal of the exception is not appealable, the litigant who has prevailed in having the exception dismissed by the high court may then re-engage the process to bring the matter to trial on all the issues. That is greatly to their benefit.

[35] It is also of systemic benefit. Delay atrophies due process. There is value in moving the process forward to trial, and securing a final judgment on all the issues. That allows for an orderly appeal process, with all the issues having crystallised before coming to this Court, should the matter be appealed. But even the litigant who has not prevailed before the high court on exception, in my example, secures some benefit. The matter is finally decided on all issues, including those that would have had to go to trial, whatever the fate of the exception.

[36] Fourth, the exception procedure can be very helpful, most especially to test whether a cause of action or defence is sustainable as a matter of law. If it is not, to resolve the dispute or some significant part of it, at an early stage of the proceedings, has much utility. That utility generally diminishes if the dismissal of an exception were to be appealable. As I have observed, the appeal stays the further progress of the matter to trial. If the appeal court upholds the exception and that brings an end to the litigation, that is plainly advantageous. But there are other

outcomes that come into the calculus. Engaging the appellate hierarchy on a point of law takes much time, at no small cost. If the point of law is important, as in the present case, there may be three appeal courts that consider the matter. If ultimately the exception is dismissed, the law will be clear, but that may well be to the detriment of the parties because the trial will have been long delayed, with many of the well-known risks that can arise as to the availability of witnesses and their ability to recall distant events. In many cases, the exception, even if ultimately successful, does not dispose of the case. The trial will have been delayed, and so too the final judgment to which the parties are entitled. There is also the practical reality that much litigation settles as the trial approaches, and the fine points of law that engage lawyers yield to commercial practicality. The possibility of such a settlement may be preferable to a lengthy process of appeal to decide an exception.

[37] There is a further consideration relevant to the calculation of utility. It is this. The exception procedure permits a litigant an opportunity to test the pleadings at an early stage before the high court. If the exception is dismissed, it is not the last opportunity to test the questions of law in an economical way. The rules make provision for the separation of issues or a stated case. It will then be for the trial court to decide whether to proceed in this way. The trial court will be placed in a position to do so, on the basis of a case where all the issues have been pleaded and the questions of fact and law (and their inter-dependence) can be analysed.

[38] In sum, bringing the matter to trial, as quickly as possible, upon the dismissal of an exception, has many advantages. They are advantages yielded by avoiding piecemeal litigation. I do not overlook the proposition, pressed in argument, that an authoritative decision by this Court on a point of law that

disposes of the case is an optimal outcome. Proceeding first to trial, in these circumstances, is a long and costly detour to no end.

[39] I do not doubt that the postulated outcome is secured by an appeal from the dismissal of an exception. However, the utility of such an appeal cannot be assessed by recourse to its most favourable outcome. As I have observed, there are many other permutations that result from a rule that would allow an appeal from the dismissal of an exception. On balance, those outcomes do not favour the adoption of such a rule. And hence, in my view, the wisdom of retaining the rule in *Maize Board*, and the long line of authority which it reflects.

[40] This holding means that the *dictum* in *Really Useful Investments*, to which I have referred, cannot stand. This Court was there willing, as best one can discern, to entertain an appeal from the dismissal of an exception on the basis that the decision of this Court would be ‘the last word’ in resolving the litigation. This has never been a qualification to the rule in *Maize Board*. Nor should it be, and for two reasons. First, this Court should not pronounce the last word on the exception until the high court has done so. Second, this Court cannot know whether its decision will finally resolve the litigation without deciding the exception. A decision on the merits of the appeal cannot provide the basis to decide whether the dismissal of an exception is appealable.

[41] In response to the conclusion that the rule in *Maize Board* should be retained, there are two counter-arguments. The first is the proposition that if an appeal from the dismissal of an exception may, on balance, sometimes be worthwhile and in other cases not, it would be preferable to decide appealability on a case-by-case basis, under the ultimate guidance of the interests of justice. For

reasons I have explained, I consider this approach to pose dangers to the rule of law and to be institutionally inapt to the place of this Court in the appellate hierarchy. Law by rule is greatly to be preferred to decision-making by impression, under the guidance of a norm of great abstraction and porosity.

[42] The second proposition is more modest, but more robust. Granted that the position adopted in *Maize Board* should generally and presumptively be of application, why not allow a modest expansion of the carve-out already recognised under the holding in *Maize Board* to allow the dismissal of an exception to be appealed, where the exception turns on a question of law, and it is decisive of the case or at least a substantial part of it. The plaintiffs and the defendant supported this position, even if only as an alternative to more ambitious submissions as to appealability.

[43] *Maize Board* does recognise a carve-out to the rule that the dismissal of an exception is not appealable. An order dismissing an exception will be appealable where the exception challenges the jurisdiction of the court. That is so for reasons that were explained in *Moch*.¹⁷ Where the challenge concerns the jurisdiction of a court, and hence the competence of a judge to hear the matter, the decision of the court is considered definitive, and appealable. This is consistent with the principles enunciated in *Zweni* because the decision as to jurisdiction is considered final. This position is entirely justified because an error as to jurisdiction, if not subject to appellate correction, would permit the court below to proceed with a matter when it had no competence to do so, rendering what it did a nullity. That is plainly an undesirable outcome. Furthermore, a challenge to jurisdiction is taken at the

¹⁷ *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) para 14.

commencement of proceedings. Until this challenge is finally resolved, a court should not exercise coercive powers that compel compliance.

[44] The dismissal of the defendant's exceptions is not analogous. They rest upon whether the appraisal remedy sought by the plaintiffs is sustainable. That, at best for the defendant, turns upon questions of law that have nothing to do with the competence of the trial court to hear the trial. Rather, the trial court can consider again whether the dismissal of the exceptions was correct. The rationale of *Maize Board* as to finality holds good.

[45] The parties, at least as to the class exception, nevertheless urge us to entertain the appeal because they say that, if the class exception is good, the litigation will be resolved in the defendant's favour. That will bring certainty, and this has value to the litigants.

[46] There may be postulated conditions under which a rule may be thought to have less utility than would ordinarily be the case. That is no reason to make an exception to the rule. If a point of law, finally decided on appeal, would dispose of a case, the rule requiring that the trial court first consider the dismissal of the exceptions may seem duplicative and wasteful. But the formulation of a rule as to appealability cannot be determined on the prospective outcome of an appeal. The points of law could be decided in the defendant's favour. But they equally might not. We cannot be invited to decide the point of law to determine whether the matter is appealable. The rule as to appealability cannot be formulated on the strength of a litigant's conviction that their law point is good. Nor should the rule rest upon whether the parties consider it to be useful to have the appellate court's decision at a particular point in the proceedings. The rule must rather capture when it is institutionally advantageous for this Court to entertain an appeal. When an

exception has been dismissed that time has not come because the principle of finality, justified by compelling reasons and high authority, has not been satisfied. The high court has yet to render its final decision.

[47] There remains one further argument pressed by the defendant. The full court dismissed the exceptions. If the exceptions are considered again by the trial court, although the exceptions are not *res judicata*, the trial court would, on questions of law, be bound by precedent to follow what the full court has decided. This renders the application of the rule in *Maize Board* an empty exercise, justifying an exception to the rule in this case. I shall reference this as ‘the problem of precedent’.

[48] There is some merit to this submission, at least in respect of the class exception which turns entirely on a question of law. I am unpersuaded however that this case warrants different treatment. The problem of precedent comes about because leave to appeal the decision of the high court to uphold the exceptions was granted to the full court. That was a misstep. The exceptions taken by the defendant concern important questions of company law. Had leave to appeal been granted to this Court, as sought by the parties, an authoritative answer would have been given by this Court, and the problem of precedent would not have arisen. The high courts will henceforth, in like circumstances, avoid the risk of the problem of precedent arising. Once that is so, there is no warrant to fashion a carve-out from the rule in *Maize Board* stated as an exception of general application.

[49] This then leaves the problem of precedent as a difficulty in this particular case. We formulate rules and follow them because their aggregate value depends upon their general application. This principle lies at the heart of the rule of law. If

we are willing to deviate from rules because, in a particular case, the rule has less utility, the value of rules unravels. We end up in a world of special pleading – the very antithesis of the rule of law. The invitation to make the problem of pleading in this appeal a special case is to be declined, if it cannot be justified under some principled and rule-bound category of deviation from the holding in *Maize Board*. I have not found there to be such a category.

[50] There is some solace for the parties in this conclusion. First, the trial court, even if bound by precedent, may take the opportunity, with the benefit of all the facts, to offer its position on the law. The trial court may agree with the full court, or it may indicate its disagreement, while still following precedent in the decision it renders. That further consideration may have value should the matter ultimately return to this Court. Second, while the class exception turns on a question of law, the relatedness exception is more closely bound up with factual averments that have been pleaded. Even if the relatedness exception is good, it is not plain that the plaintiffs will not bring their ingenuity to bear to reformulate their case. The advantage of the matter going to trial is that the plaintiffs must pin their colours to the mast. They must take a view on the law and the facts they mean to prove. These will then be decided at trial with finality.

Conclusion

[51] For these reasons, I find that the orders made by the full court do not meet the requirements of appealability to this Court. As a result, despite special leave having been granted by two judges of this Court, the appeal is not properly before this Court and the appeal must be struck from the roll. The parties both sought to persuade us that we should entertain the appeal, at least in respect of the class

exception. In that they have failed. It would thus be appropriate that each party bears its own costs of the appeal.

[52] In the result, I make the following order:

The appeal is struck from the roll.

D N UNTERHALTER
ACTING JUDGE OF APPEAL

Appearances

For the appellant:

A Cockrell SC and I Kentridge

Instructed by:

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McIntyre Van der Post, Bloemfontein

For the respondents:

B Swart SC and J Mÿburgh

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