THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 186/2023

In the matter between:

WALTER ELEAZAR CYRIL **FIRST APPELLANT**

LETISHA CYRIL **SECOND APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Cyril and Another v The Commissioner for the South African Revenue Service* (Case no 186/2023) [2024] ZASCA 32 (28 March 2024)

Coram: GORVEN and KGOELE JJA and COPPIN, SMITH and KEIGHTLEY AJJA

Heard: 13 March 2024

Delivered: 28 March 2024

Summary: Practice – Appealability – application to review ruling on admissibility in criminal trial while trial still pending – leave given to complainant to intervene in review application – test for appealability – no final and definitive effect on review application – does not dispose of any portion of relief in review

application – courts opposed to piecemeal adjudication – interests of justice not supporting appealability – no jurisdiction to entertain appeal – not appealable.

ORDER

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

The appeal is struck from the roll with costs, such costs to include the costs of the application for leave to appeal, all of which will include those consequent on the employment of two counsel.

JUDGMENT

Gorven JA (Kgoele JA and Coppin, Smith and Keightley AJJA concurring)

[1] This appeal arises from an application to intervene in an application to review and set aside the decision of a magistrate to admit certain evidence in a criminal trial. The review application was brought by Mr Walter Cyril and Ms Letisha Cyril, the appellants (the Cyrils). The Commissioner for the South African Revenue Service, the respondent (SARS) is the complainant in the criminal trial. The Cyrils are charged with 41 counts of fraud and 41 counts of contravening s 18A(9) read with s 80(1)*(o)* of the Customs and Excise Act 9 of 1964 (the CEA) for allegedly diverting cigarettes without paying duties or VAT, 41 counts of contravening s 84(1) of the CEA for allegedly making false declarations and 41 counts of contravening s 83*(a)* read with s 47A of the CEA for allegedly unlawfully causing goods not entered for home consumption to be removed and/or dealt with without the payment of duty and VAT.

[2] In *Gaertner and Others v Minister of Finance and Others*,[1] the Constitutional Court upheld the finding of the Western Cape High Court, Cape Town that sections 4(4)*(a)*(i)-(ii), 4(4)*(b)*, 4(5) and 4(6) of the CEA are inconsistent with the Constitution. It suspended the declaration of invalidity to afford Parliament the opportunity of amending the CEA in a manner which achieved constitutional conformity. Paragraph 2 of the order of the Constitutional Court read that 'The declaration of invalidity is not retrospective'. That conclusion was motivated along the following lines:

'It is clear that an order of full retrospective effect would render unlawful all searches under section 4(4) from when the Constitution came into force. In the present circumstances, this approach would be inconsistent with our jurisprudence.'[2]

and

'The declaration of invalidity should be suspended as, without the suspension, SARS will not be able to conduct even regulatory searches and a lacuna will be created. A suspension coupled with an interim reading-in will afford Parliament an opportunity to craft an appropriate legislative solution to remedy the constitutional defect, while – in the interim – ensuring that SARS can properly carry out its duties in terms of the Customs and Excise Act. Leaving SARS without the necessary power to ensure compliance with the Act would simply not be in the public interest.'[3]

[3] Before the Constitutional Court handed down the judgment in *Gaertner*, SARS had inspected the bonded warehouse of Tish Maritime CC, a close corporation under the control of the Cyrils. That search brought to light the contested evidence. It is common ground that it was conducted pursuant to the sections of the CEA which were subsequently declared unconstitutional. This gave rise to the challenge to its admissibility at the trial. The chief contention of the

[1] *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) para 74 (*Gaertner*).
[2] *Gaertner* para 76.
[3] *Gaertner* para 78.

Cyrils was that the search, and others like it conducted prior to the Constitutional Court judgment in *Gaertner*, was struck by the order of invalidity. They argued that *Gaertner* invalidated inspections conducted by SARS in terms of s 4(4) of the CEA in 'all matters that had not yet been finalised prior to the declaration of invalidity'. The magistrate, after holding a trial within a trial, ruled the evidence admissible.

[4] After the evidence had been ruled admissible, and while the criminal trial was pending, the Cyrils applied to the Gauteng Division of the High Court, Johannesburg (the high court) to review and set aside that ruling. This prompted SARS to seek leave to intervene in the review application as the third respondent (the intervention application). It also sought to lead additional evidence in the review application. SARS submitted that it had a direct and substantial interest in the outcome of the review application. It argued that this was all the more so since the Cyrils sought to render unlawful all searches in that category, and not only the search of their premises. The intervention application was dealt with separately and Mahalelo J granted SARS leave to intervene. This appeal is against that order and is before us with the leave of the high court.

[5] Two factors must be present in order to confer jurisdiction on this court to entertain an appeal. The first of these is that leave to appeal must have been granted. Of this, Brand JA said:

'Leave to appeal therefore constitutes what has become known, particularly in administrative-law parlance, as a jurisdictional fact. Without the required leave, this court simply has no jurisdiction to entertain the dispute.'[4]

[4] *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25; 2015 (4) SA 34 (SCA); [2015] 2 All SA 322 para 13.

Section 17(1) of the Superior Courts Act 10 of 2013 (the Act) sets out the grounds on which leave to appeal can be granted:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)*(a)*; and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

This jurisdictional fact is present because leave to appeal was granted. However, the grant of leave to appeal is not decisive as to the appealability of the order. A second jurisdictional fact must be present.

[6] The second jurisdictional fact is that the order constitutes a 'decision' as envisaged in s 16(1)*(a)* of the Act. There is no distinction between 'a "decision" of the high court "on appeal to it" in terms of s 16(1)*(b)* of the Act, or a "judgment or order" of the high court "given on appeal to it" in terms of ss 20(1) and 20(4) of the [Supreme Court] Act'.[5] Until fairly recently, the accepted approach to appealability was governed by *Zweni v Minister of Law and Order*.[6] In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*, this approach was summarised as follows:

' . . . the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.'[7]

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[5] *S v Van Wyk and Another* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para 20, fn 6. The reference is to the now repealed Supreme Court Act 59 of 1959. See also *Nova Property Group Holdings Ltd and Others v Cobbett and Another* [2016] ZASCA 63; 2016 (4) SA 317 (SCA); [2016] 3 All SA 32 paras 8–9.

[6] *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532J–533A (*Zweni*).

[7] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 para 49.

[7] Since then, there have been significant developments in our law on this point.

It is now accepted that the *Zweni* requirements are not 'cast in stone'[8] and a matter may be appealable if 'the interests of justice require it to be regarded as an appealable decision'.[9] This has been affirmed by the Constitutional Court in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*.[10] The Constitutional Court made it clear that the interests of justice approach is not limited to the Constitutional Court but applies equally to this court. In *Government of the Republic of South Africa and Others v Von Abo*, this court summarised the present approach to appealability of orders in our law:

'It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.'[11]

[8] It is common ground that the order on the intervention application is interlocutory to the review application. The fact that it is interlocutory is not decisive as to appealability as was explained in *Lebashe*:

'In deciding whether an order is appealable, not only the form of the order must be considered, but also, and predominantly, its effect. Thus, an order which appears in form to be purely interlocutory will be appealable if its effect is such that it is final and definitive of any issue or portion thereof in the main action. By the same token, an order which might appear, according to

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[8] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) at 10E–G.
[9] *Road Accident Fund v Taylor and other matters* [2023] ZASCA 64; 2023 (5) SA 147 (SCA) (*Taylor*) para 26. See also *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) para 5.
[10] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2023 (1) SA 353 (CC); 2022 (12) BCLR 1521 (CC) (*Lebashe*) para 45.
[11] *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA) para 17.

its form, to be finally definitive in the above sense may, nevertheless, be purely interlocutory in effect.'[12]

It is significant that it must be 'final and definitive of any issue . . . in the main action' and dispose of 'a substantial portion of the relief claimed'. The main action for present purposes is the review application.

[9] With those contours sketched, it is necessary to evaluate the present matter. Beginning with the *Zweni* trilogy, the order is final in effect in that it is not susceptible to reconsideration by the court of first instance which granted it. However, it does not dispose of any portion of the relief claimed in the review application. It is likewise not definitive of the rights of the parties in the review application or, for that matter, the criminal trial. Two out of the three criteria set out in *Zweni* are thus not met. As I discuss in more detail later, these two unmet criteria are of particular significance in the context of this case.

[10] A further factor to consider is the caution which our courts have voiced against engaging in piecemeal litigation. Both this court and the Constitutional Court have held that this should not be encouraged.[13] Since the judges hearing any appeal from the criminal trial are entitled to decide questions of admissibility of evidence, the review application itself amounts to piecemeal litigation. That piecemeal litigation is further exacerbated by the Cyrils seeking to appeal the order granting SARS leave to intervene in the review application.

[11] This, then, leaves for consideration whether the interests of justice require the order in the intervention application to be dealt with as an appealable decision.

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[12] *Lebashe* para 41.

[13] *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA); [2010] 2 All SA 9 (SCA) para 89. *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others* [2019] ZACC 41; 2020 (1) SA 327; 2020 (1) BCLR 1 (CC) para 108.

The Cyrils mounted an attack on two fronts in this regard. In the first place, they relied on a dictum in the matter of *Nedbank Limited and Another v Survé and Others* where it was said:

'In a matter where no case was made out for an interim interdict and the order accordingly ought never to have been granted in the first place, along with other relevant considerations, interests of justice might well render an interim interdict appealable despite the *Zweni* requirements not having been met. An analysis of the second issue in this appeal, namely, whether the respondents made out a prima facie case for the interim interdict granted, demonstrates that this appeal is one of those exceptional cases.'[14]

That reliance is misplaced. The interests of justice aspect was addressed as follows in *Survé*:

'The equality court found, albeit on a *prima facie* basis, that Nedbank's decision to close the respondents' accounts was based on unfair racial discrimination. This is a serious charge. Racism is a scourge which has infected the fabric of our national life for well over three hundred years. The Equality Act was specifically devised, in part, to address and eliminate this scourge. Any order under this section of the Equality Act requires a finding that the entity against which the order is granted has unfairly discriminated on the ground of race. A finding of that nature has obvious serious reputational repercussions, particularly considering Nedbank's standing as one of the major banks in South Africa. Where a case is properly made out for an order having this effect, a party cannot be heard to complain. However, where, as in this case, the order ought never to have been made, justice requires that the impugned decision is rendered appealable and rectified.'[15]

This followed the approach of the Constitutional Court in *Lebashe* that the interests of justice dictated that an interim interdict should be appealable where the fundamental right to freedom of speech was infringed by the order.[16] The Constitutional Court went on to endorse the approach of this court that an order

[14] *Nedbank Limited and Another v Survé and Others* [2023] ZASCA 178; [2024] 1 All SA 615 (SCA) para 18 (*Survé*).
[15] *Survé* para 30.
[16] *Lebashe* para 45.

would be appealable 'where a litigant may suffer prejudice or even injustice if an order or judgment is left to stand'.[17]

[12] The present matter differs fundamentally from those matters. In each of them, an order had been granted against the person seeking to appeal. No order has been granted against the Cyrils. Not only that, but in the other matters, the order in question prejudiced the party against whom it had been granted. That is also not the case with the Cyrils. The order giving leave to SARS to intervene in the review application does not by any stretch of the imagination equate to such a situation. SARS will have a say in the review but this does not affect the rights of the Cyrils to prosecute the review. As indicated, even if the review application is dismissed, in the event that the Cyrils are convicted, it is open to them to argue on appeal that the evidence was wrongly admitted and should be excluded from consideration. It is a factor to consider as to appealability that, '[there] may yet be another appeal on the issues that have still to be determined'.[18] Apart from their submission that it affects their right to a fair trial, which will be addressed below, the Cyrils did not point to any form of prejudice or impact on any of their fundamental rights resulting from the impugned order.

[13] The Cyrils contended that, as with *Survé*, the order in the intervention application ought never to have been granted. This renders the matter appealable, they submitted. Apart from the distinctions mentioned above, the thrust of the argument of the Cyrils was not that SARS does not have a direct and substantial interest in the outcome of the review application. It clearly does have such an

[17] *Lebashe* para 46 referring to the matter of *Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS* [2010] ZASCA 65; 2010 (6) SA 469 (SCA) para 25.
[18] *Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) para 21.

interest. The submission of the Cyrils was that in a criminal trial, the Director of Public Prosecutions (DPP) alone has standing to protect that interest. Since SARS does not have standing to prosecute the Cyrils, it has no standing to intervene in what, the Cyrils submitted, was effectively part of the criminal trial.

[14] In support of this submission, the Cyrils relied on *Wickham v Magistrate, Stellenbosch and Others*.[19] In that matter, the driver of a motor vehicle was charged with culpable homicide for the death of the son of Mr Wickham and another. The son was a passenger in a motor vehicle driven by the accused. Mr Wickham obtained an expert report on her driving and submitted it to the prosecution. He engaged extensively with the prosecution on the matter. The Director of Public Prosecutions (DPP) met with his attorney. Mr Wickham thereafter made written representations to the DPP. He and his attorney met with the DPP. The DPP indicated that she was concerned that, without the plea and sentencing agreement, the State might not obtain a conviction. Mr Wickham disagreed and motivated, with reference to the expert report, why he believed a conviction could be obtained. Despite these efforts, the DPP entered into a plea and sentence agreement with the driver. Mr Wickham requested an opportunity to address the court. The DPP said that he could prepare and hand in an affidavit addressing his concerns but subsequently informed him that this could not be done since it did not qualify as a victim impact statement. The magistrate refused to accept the affidavit since, he ruled, Mr Wickham did not have standing. The plea and sentencing agreement was accepted by the magistrate in terms of s 105A(7)*(b)*(i)*(bb)* of the Criminal Procedure Act 51 of 1977 and the driver was convicted of two counts of culpable homicide. The magistrate imposed the agreed sentence of a fine of R10 000 or

[19] *Wickham v Magistrate, Stellenbosch and Others* [2016] ZACC 36; 2017 (1) BCLR 121 (CC); 2017 (1) SACR 209 (CC).

12 months' imprisonment suspended for 3 years, and a further 18 months of correctional supervision. Mr Wickham applied to the high court for the plea and sentencing agreement to be set aside and for the matter to be remitted to the Magistrates' Court for the driver to be tried afresh. The Constitutional Court agreed with the high court that Mr Wickham lacked *locus standi* to apply to have the plea and sentence agreement and consequent convictions and sentence set aside.

[15] One cannot by any stretch of the imagination equate the position of SARS in the review application with that of the father of a victim of culpable homicide approaching a court to set aside a criminal court conviction and sentence. The order joining SARS in the review application does not equate to it participating in the criminal trial or seeking to set aside the outcome of the trial.

[16] The second ground of attack is that the order affects the fair trial rights of the Cyrils. In this, they call in aid the following passage in *The State v Van der Walt*:

'Both parties accept that the regional magistrate pronounced on the admissibility of exhibits after the applicant had closed his case. This was when she handed down judgment on the question of guilt. Undeniably, a timeous ruling on the admissibility of evidence is crucial. It sheds light on what evidence a court may take into consideration and may even give an indication as to how much weight may be accorded to it. This enables an accused to make an informed decision on whether to close her or his case without adducing evidence, or, where she or he does testify or adduce evidence, to adduce further evidence to controvert specific aspects of evidentiary material. Without a timeous ruling on all evidence that bears relevance to the verdict, an accused may be caught unawares at a stage when she or he can no longer do anything.'[20]

In seeking to rely on this *dictum*, the heads of argument delivered on behalf of the Cyrils made the following bald submission:

[20] *S v Van Der Walt* [2020] ZACC 19; 2020 (2) SACR 371 (CC) para 25.

‘The outcome of the review proceedings will determine the choices the [Cyrils] make as accused persons in their criminal trial. And because the outcome of the review implicates the [Cyrils’] criminal trial, SARS’ intervention implicates the [Cyrils’] constitutional rights to a fair trial.’

This submission was neither pressed nor elaborated on in argument before us. It need hardly be said that a ruling on evidence given after the conclusion of a trial adversely affects the fair trial rights of an accused person. In the present matter, however, nothing done in the review application would affect the rights of the Cyrils to make informed decisions as to the conduct of their defence. The review application would have an additional party. That party would not be able to unfairly influence the outcome of the review application or, more importantly, the criminal trial. The ruling of the magistrate on admissibility will either be found to pass muster or not. The leave given to SARS to intervene in the review in no way undermines the right of the Cyrils to a fair trial.

[17] In the view I take of the matter, the order in the intervention application does not meet the appealability criteria arising from *Zweni* developed over the years as set out above. There is no warrant for finding that the interests of justice require the impugned order to be dealt with as an appealable decision. That being the case, the second jurisdictional fact is absent. This court, accordingly, has no jurisdiction to entertain the appeal. As such, it must be struck from the roll.

[18] Regarding costs, they should follow the result. Both parties utilised the services of two counsel. This was appropriate in the circumstances and the costs of two counsel should be allowed. The order granting leave to appeal directed that the costs of the application for leave to appeal were to form costs in the appeal. Since the appeal will not be heard, it is appropriate that those costs be made part of the striking of the appeal from the roll.

[19] In the result, the following order issues:

The appeal is struck from the roll with costs, such costs to include the costs of the application for leave to appeal, all of which will include those consequent on the employment of two counsel.

T R GORVEN

JUDGE OF APPEAL

Appearances

For the appellant:	A Katz SC with K Perumalsamy
Instructed by:	M Attorneys Incorporated, Sandton
	Symington De Kok Incorporated, Bloemfontein
For the respondents:	G Marcus SC with M Mbikiwa
Instructed by:	VDT Attorneys, Pretoria
	Phatshoane Henny Attorneys, Bloemfontein