THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case No: 151/2001

In the matter between:

MAIZE BOARD	Appellant
and	
TIGER OATS LIMITED	1st Respondent
TIGER FOOD INDUSTRIES LIMITED	2nd Respondent
UNIVERSAL FOODS LIMITED	3rd Respondent

Coram: Smalberger, ADP, Marais, Streicher, Cameron, JJA and Lewis, AJA

Heard: 20 May 2002

Delivered: 31 May 2002

Condonation – appealability of dismissal of exception.

J U D G M E N T

STREICHER, JA/

STREICHER JA:

[1] The appellant sued the respondents in the Transvaal Provincial Division ('the court *a quo')* for payment of certain levies imposed in terms of the now repealed Marketing Act 59 of 1968 and the Summer Grain Scheme promulgated in terms of that Act. The respondents filed a special plea of prescription to which the appellant excepted on the ground that the levies imposed constituted a tax with the result that the prescriptive period in terms of s 11 of the Prescription Act 68 of 1969 was 30 years and not three years as alleged by the respondents. The court *a quo* held that the levies did not constitute a tax and dismissed the exception. An application for condonation of the late filing of an application for leave to appeal was subsequently dismissed by the court *a quo* on the ground that the dismissal of the exception was not appealable. With the

leave of the court *a quo* the appellant now appeals against the dismissal of the application for condonation.

[2] Before its amendment by Act 105 of 1982, s 20(1) of the Supreme Court Act 59 of 1959 provided for an appeal, in certain civil cases, against a 'judgment or order' of the court of a provincial or local division. In some instances leave to appeal was required and in others there was an automatic right of appeal. Section 20(2) provided that the following provision would, amongst others, apply in connection with appeals under subsection (1):

> 'no interlocutory order shall be subject to appeal save with the leave of the court by which the judgment was given or the order was made'.

[3] The amended s 20 still provided for an appeal against a 'judgment or order' of a provincial or local division in civil proceedings subject, however, to obtaining the leave of the court against whose judgment or order the appeal was

or, depending on the circumstances, the leave of the appellate division, but no longer contained any reference to interlocutory orders. That is still the position in terms of the present s 20.

[4] Dealing with the provisions of s 20 as it read after its amendment by Act 105 of 1982 this court held, per Harms AJA in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536B-D:

> ‘[G]enerally 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. . . .
> I am aware that the consequence of this conclusion is that a number of decisions which were appealable with leave prior to the amendment of s 20 of the Act by the Appeals Amendment Act 105 of 1982 are no longer appealable at all. It was the intention of the Legislature in effecting that amendment to reduce the number of appeals and, so it appears to me, to bring the appealability of decisions from Provincial and Local Divisions of the Supreme Court more or less in line with that from a magistrate's court.’

[5] In *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A) at 269F, F H Grosskopf JA, after having referred to *Zweni,* said in respect of an order upholding an exception to particulars of claim on the ground that they were vague and embarrassing:

> 'The appealability of the order of the Court *a quo* depends, *inter alia*, on whether it has final and definitive effect.'

[6] The general principle stated in *Zweni,* more particularly the requirement of finality, was reaffirmed by this court in a number of subsequent cases (see *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A) at 414F-H; *Trakman NO v Livshitz and Others* 1995 (1) SA 282 (A) at 289B-D; *Jones v Krok* 1995 (1) SA 677 (A) at 684E-

685A; *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A) at 690D-G; *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 356H-358B; *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1042D-G; *Guardian National Insurance Co Ltd v Searle NO* 1999 (3) SA 296 (SCA) at 301B-D; and *South African Chemical Workers' Union and Another v African Commerce Developing Co (Pty) Ltd t/a Buffalo Tapes* 2000 (3) SA 732 (SCA) at 737I). In *Cronshaw* Schutz JA said in regard to the question as to when a decision is final (at 690E-G):

> 'The question is intrinsically difficult, and a decision one way or the other may produce some unsatisfactory results. There has to be a rule, however, and that rule was laid down by not later than the *Pretoria Garrison* case [*Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A)]. It is, as stated by Schreiner JA (at 870) that
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> > ". . . a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit", or, which amounts, I think, to the same thing, unless it "irreparably

> anticipates or precludes some of the relief which would or might be given at the hearing" '.
>
> . . . it is one of the attributes of a 'judgment or order' . . . that it be final in effect and not susceptible of alteration by the Court of first instance: *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-J.'

In *Guardian National Insurance Co Ltd* Howie JA, before restating the three attributes mentioned in *Zweni,* said (301B-C):

> 'As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time. Where this approach has been relaxed it has been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes.'

[7] However, in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) this court recognized an exception to the general

principle enunciated in *Zweni.* Hefer JA said in respect of the above quoted passage in *Zweni* (at 10F)*:*

> 'However, the passage in question does not purport to be exhaustive or to cast the relevant principles in stone.'

He held that the dismissal of an application to an acting judge to recuse himself was appealable because the decision, although not actually defining the parties' rights or disposing of any of the relief claimed in respect thereof had a very definite bearing on these matters. It reflected on the competence of the presiding judge to define the parties' rights and to grant or refuse the relief claimed. The dismissal of an application to a judge to recuse himself is clearly a very special case. As was said by Hefer JA (at 10D):

> 'A decision dismissing an application for recusal. . . goes to the core of the proceedings and, if incorrectly made, vitiates them entirely.'

[8] In *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 601 Innes CJ said in respect of the question whether an order dismissing an exception was final:

> 'The characteristics of purely interlocutory orders were fully considered in that case,[1] and most of the South African decisions were discussed. It was then laid down that a convenient test was to inquire whether the final word in the suit had been spoken on the point; or, as put in another way, whether the order made was reparable at the final stage. And regarding this matter from that standpoint, one would say that an order dismissing an exception is not the final word in the suit on that point [in] that it may always be repaired at the final stage. All the Court does is to refuse to set aside the declaration; the case proceeds; there is nothing to prevent the same law points being re-argued at the trial; and 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.'

[9] However, in *Du Toit v Ackerman* 1962 (2) SA 581 (A) at 587D-E this court held that the dismissal of an exception on the ground that the court does

[1] *Steytler v Fitzgerald* 1911 AD 295.

not have jurisdiction to hear the matter constituted a final judgment and as such an exception to the general principle that the dismissal of an exception is not final. The court relied on the authority of *Steytler NO v Fitzgerald* 1911 AD 295 in which De Villiers CJ said (at 305):

> 'The Court . . . decided that it had jurisdiction, with the result that whatever the final decision might be, the executor was made amenable against his will to a jurisdiction other than that of his own dwelling-place. Such an order, in my opinion, has also the effect of a definitive sentence.'

De Villiers CJ said that he was dealing with an exception but he was in fact dealing with a special plea (see pp 298, 302 and 310 of the report). The dismissal of an exception on the ground that the court does not have jurisdiction is nevertheless similar to that of a refusal by a judge to recuse himself since the result in both cases is that the matter has to proceed before a judge who should not be hearing the matter.

[10] This court has since the amendment of s 20 in 1982 dealt with a number of appeals against orders dismissing exceptions. Some of these cases are mentioned in *Minister of Safety and Security and Another v Hamilton* 2001 (3) SA 50 (SCA) at 53A. To those mentioned can be added *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A). In none of the judgments in these cases was the question of the appealability of the decision to dismiss an exception addressed. It can in my view fairly be assumed that the question was not raised in argument either. However, in three recent cases in this court the court was confronted squarely with that question. They are *Wellington Court Shareblock v Johannesburg City Council; Agar Properties (Pty) Ltd v Johannesburg City Council* 1995 (3) SA 827 (A); *Kett v Afro Adventures (Pty) Ltd and Another* 1997 (1) SA 62 (A); and *Minister of Safety and Security and Another v Hamilton supra*. In *Wellington* it was held that the

dismissal of an exception to particulars of claim on the ground that they did not disclose a cause of action was not appealable. In *Kett* it was held that the dismissal of an exception to a special plea on the ground that it lacked averments necessary to sustain the proposed defence was not appealable. In both cases the court relied on the decision in *Blaauwbosch* to the effect that the order made was capable of being reconsidered by the trial court and as such not 'the final word in the suit on the point'.[2]

[11] *Hamilton* was also a case in which an exception to particulars of claim on the ground that they did not disclose a cause of action was dismissed. On appeal the majority of the members of the court thought that there was no need to revisit the latest decisions on the question of the appealability of an order dismissing an exception. They were of the view that the order granted by the court below was not an order dismissing an exception on the merits of the

[2] *Wellington* at 835D; and *Kett* at 65H.

exception's challenge to the legal foundation of the claim and that it was for that reason not a 'judgment or order' which could be appealed against.[3] The other members of the court were of the view that the order constituted a dismissal of an exception and said, per Nienaber JA:[4]

> 'The rule is that the dismissal of an exception is not appealable to this Court, save perhaps in that rare category of case (of which this case, on any reading, is not one) where the issue in question is presented in form as an exception but the procedure in substance and effect is a stated case. It is worthwhile, I think, to remind oneself once again of what Innes CJ said in *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 601: . . .'

[12] The appellant submitted that the present case is a case which in form was presented as an exception but in substance was a stated case. It argued that that was the case as the issue that had to be decided was a law point and that no

[3] At 53 para 9.
[4] At 55G para 4.

relevant evidence could be led in respect thereof. However, it is clear that the respondents would not have agreed that the matter be dealt with as if it was a stated case and that they did in fact not deal with it as such. They contended in the court *a quo,* as well as before us, that evidence was required to decide whether the levies in question constituted a tax or not and stated that they intended adducing such evidence at the trial of the matter. It is not necessary to decide at this stage whether evidence would be admissible in respect of the issue whether the levies constituted a tax or not. I shall assume in favour of the appellant that such evidence would not be admissible. The mere fact that the issue to be decided in an exception is purely a matter of law does, however, not convert an exception into a stated case. When it has to be decided whether a declaration or particulars of claim disclose a cause of action or whether a plea discloses a defence the issue often is whether in law that is the case. A decision

on that point of law is not final. *Blaauwbosch* is clear authority to that effect. The point may be re-argued at the trial in the event of the exception being dismissed. The position would have been different if the court *a quo* had, at the request of the parties or of its own accord made an order in terms of Rule 33(4) of the Uniform Rules directing that the issue raised by the exception be finally disposed of.

[13] In *Makhothi v Minister of Police* 1981 (1) SA 69 (A) it was held that an exception to a special plea was appealable. The exception had been taken to a special plea which claimed that the plaintiff's action was barred because the notice required by s 32(1) of the Police Act 7 of 1958 had not been timeously given. However, all the relevant facts were common cause on the pleadings and if timeous notice had not been given in terms of the section that was the end of the matter. It is in those circumstances that this court decided that by dismissing

the exception to the special plea the court below had spoken ‘the final word in the suit’. In the present case the position is quite different. A dismissal of the exception could not and still cannot be regarded as the final word in the suit. The appellant could still contend that, even if the prescriptive period was three years, the claim had not prescribed because, in terms of s 12 of the Prescription Act, the debt only became due on a date less than three years prior to the date of service of the summons, or because prescription had been interrupted in terms of s 15 of the Prescription Act, or because the completion of prescription had been delayed in terms of s 13 of the Prescription Act. In the event the appellant did, after the dismissal of its exception, file a replication in which it alleged that, in terms of s 12 of the Prescription Act prescription commenced running only less than three years before summons was served on the respondents.

[14] 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. If litigating parties wish to obtain a final decision, whichever way the decision of the court goes on an issue raised by an exception, they should make use of the procedure designed for that purpose namely the procedure provided for in Rule 33 and either agree on a special case in terms of that rule or request the court to direct that the issue be finally disposed of in an appropriate manner.

If that is done any misunderstanding on the part of any of the parties and any resulting prejudice should be avoided.

[15] For these reasons I am of the view that the court *a quo* correctly dismissed the application for condonation.

[16] The appeal is dismissed with costs including the costs of two counsel.

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P E STREICHER
Judge of Appeal

Smalberger, ADP)
Marais, JA)
Cameron, JA)
Lewis, AJA) concur