THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1332/2021

In the matter between:

UNICA IRON AND STEEL (PTY) LTD	**FIRST APPELLANT**
MOHAMED ASIF QASIM	**SECOND APPELLANT**

and

THE MINISTER OF TRADE AND INDUSTRY	**FIRST RESPONDENT**
THE MANUFACTURING DEVELOMENT BOARD	**SECOND RESPONDENT**

Neutral citation:	*Unica Iron and Steel (Pty) Ltd and Another v The Minister of Trade and Industry and Another* (Case no 1332/21) [2023] ZASCA 42 (31 March 2023)
Coram:	VAN DER MERWE, SCHIPPERS, MOTHLE, WEINER AND GOOSEN JJA
Heard:	17 February 2023
Delivered:	31 March 2023

Summary: Appeal – order declaring that attorney authorised to act in action – not appealable unless interests of justice so demand – parties agreeing that appeal hinges on legal issue – issue agreed upon academic and abstract – interests of justice do not require order be regarded as appealable decision – matter struck from roll.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Matime AJ sitting as court of first instance):

The matter is struck off the roll with costs, including the costs of two counsel.

JUDGMENT

Weiner JA (Van der Merwe, Schippers, Mothle and Goosen JJA concurring)

[1] In March 2015, the respondents, the Minister of Trade and Industry (the Minister), and the Manufacturing Development Board (the MDB)[1] instituted action in the Gauteng Division of the High Court, Pretoria (the high court) against the appellants, Unica Iron and Steel (Pty) Ltd (Unica) and Mr Mohamed Asif Qasim (Mr Qasim).[2] In the action, they claimed repayment of incentive grants in the sum of R4 734 986.00, which had been paid to Unica in terms of the Small Medium Enterprise Development Programme (SMEDP).

[2] The Minister is responsible for the Department of Trade and Industry (the DTI). The MDB is a juristic entity established in terms of s 2(1) of the Manufacturing Development Act 187 of 1993 (the Act). The Minister, in terms of the Act, implemented the SMEDP which offered incentive grants to

[1] When the respondents are referred to together, they will be referred to as the 'respondents'.
[2] Similarly, when the appellants are referred to together, they will be referred to as the 'appellants'.

beneficiaries who qualified for the programme. Pursuant to an application by Mr Qasim, on behalf of Unica, an agreement was concluded in terms of which such grants were made available to and paid to Unica. The respondents alleged in the action that Unica and Mr Qasim had breached the agreement, by failing to comply with the requirements of the relevant local authorities relating to the protection of the environment. They thus sought to recover the amounts paid.

[3] The appellants filed a Notice in terms of Rule 7 of the Uniform Rules of Court (rule 7), disputing the mandate of Rudman & Associates Incorporated (Rudmans) to act on the respondents' behalf. Rule 7(1) provides that:

'Subject to the provisions of sub-rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such a person is so acting, or with the leave of the court on good cause shown at any time before judgement, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

[4] Rule 7 does not prescribe the manner in which authority to act may be established, where such authority is challenged. In *Administrator, Transvaal v Mponyane and Others*,[3] Botha J dealt with the requirements of rule 7 and stated that:

'In my view there is nothing in Rule 7 in its present form that requires the authorisation of an attorney to be embodied in a document styled a power of attorney. The provisions of Rule 7 specifically requiring powers of attorney in appeals fortifies the impression that otherwise an attorney's mandate can be proved otherwise than by the production of a

[3] *Administrator, Transvaal v Mponyane and Others* [1990] 4 All SA 257 (W).

written power of attorney. I also think that Rule 7 should be viewed against the background of its original form. Before its recent amendment it only required powers of attorney to be lodged in the case of actions and appeals…I have no doubt that the underlying intention of the recent amendment of Rule 7 was to make the Rule less cumbersome and formalistic. I therefore conclude that proof of the authority of the respondents' attorney is not dependent on the production of a written power of attorney.'[3]

[5] The respondents attempted to demonstrate to the appellants that Rudmans were duly authorised, without success. In the light of this dispute, the respondents applied to the high court for a declarator that Rudmans had been and were authorised to represent them in the matter.

[6] The high court granted the order with costs. The arguments of the appellants before the court a quo included a submission that it was not legally permissible for the State Attorney to appoint private attorneys to act on its behalf in a district where the State attorney has an office. The appellants contended that this was contrary to the provisions of s 8 of State Attorney Act 56 of 1957.[4] The high court rejected this contention and accepted that Rudmans had been instructed by the State Attorney, as its correspondent.

[7] The order was based upon the supposition that it was the State Attorney, as opposed to the DTI, who had instructed Rudmans, when this was not correct. It is apparent that, based upon this reasoning, the parties formulated the question of law on the basis that the State Attorney had instructed and

[3] Ibid at 258.

[4] Section 8 (1) provides: The State Attorney shall be entitled in the exercise of his functions aforesaid to instruct and employ as correspondent any attorney or other qualified person to act in any legal proceedings or matters in any place in the same way and, mutatis mutandis, subject to the same rules, terms and conditions as govern attorneys in private practice, and shall be entitled to receive and recover from such correspondent the same allowances as he would be entitled to do if he were an attorney in private practice.

mandated Rudmans to act for the respondents. However, as will appear below, on the facts of this case, there is no evidence that the State Attorney appointed Rudmans to act on its behalf.

[8] The high court granted leave to the appellants to appeal to this Court.[5] In terms of rule 8(8) of this Court,[6] the parties agreed that the appeal hinged on a question of law and they formulated it by agreement. It reads as follows:

'Does the State attorney, pursuant to, inter alia, the State Attorneys Act 56 of 1957, have the power and authority to appoint and instruct an attorney from the private sector, in the same district as that in which the State attorney is based or has an office, to act as the primary attorney in a matter involving the State or an organ of State?'

[9] Although the high court granted leave to appeal to this Court, that decision does not bind this Court. The Constitutional Court in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (United Democratic Movement)*[7] held that:

'In terms of section 168(3) of the Constitution, the Supreme Court of Appeal has jurisdiction to hear and decide appeals on any matter arising from the High Court. When a matter comes before the Supreme Court of Appeal, it has jurisdiction to determine whether the lower court's ruling in the proposed appeal is a "decision" within the meaning of section 16(1)*(a)* of the Superior Courts Act. *The Supreme Court of Appeal is not bound by*

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[5] The appellants do not appeal against the costs order.

[6] Rule 8(8) of the Rules regulating the conduct of the proceedings of the SCA states that:
'(8)(a) Whenever the decision of an appeal is likely to hinge exclusively on a specific issue or issues of law and/or fact, the appellant shall, within 10 days of the noting of the appeal, request the respondent's consent to submit such issue or issues to the Court, failing which the respondent shall, within 10 days thereafter, make a similar request to the appellant.
(b) The respondent or the appellant, as the case may be, shall within 10 days agree thereto or state the reasons for not agreeing to the request.
(c) The request and the response shall form part of the record.

[7] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC).

the lower court's assessment and is entitled to reach its own conclusion on the question. The word "decision" is given a meaning equivalent to the meaning given to the words "judgment or order". The word "judgment" is used to refer to the decision of a court as well as its reasoning.'[8] (Emphasis added.)

'…The Supreme Court of Appeal was not only entitled but obliged to determine whether the matter was an appeal against a "decision" and thus an appeal within its jurisdiction. The High Court's granting of leave to appeal did not bind the Supreme Court of Appeal on that issue.'[9]

[10] An appeal lies only against an order granted. The order in the present matter is an interlocutory order. Thus, the first question is whether it is a 'decision' in terms of s 16(1)*(a)* of the Superior Courts Act 10 of 2013 (Superior Courts Act), which provides:

'16 Appeals generally. —

(1) Subject to section 15(1), the Constitution and any other law —

(a) an appeal against *any decision* of a Division as a court of first instance lies, upon leave having been granted —

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6); or …' (Emphasis added.)

[11] The order is not final nor definitive of the rights of the parties to the action and does not have the effect of disposing of any portion of the relief claimed in the main proceedings. In *DRDGOLD Limited and Another v Nkala and Others (DRDGOLD),*[10] this Court stated:

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[8] Ibid para 39 footnotes omitted.

[9] Ibid para 40.

[10] *DRDGOLD Limited and Another v Nkala and Others* [2023] ZASCA 9.

'What then, is a 'decision' contemplated in s 16(1)? To answer this question, one must examine the corresponding position under the Supreme Court Act. Section 20(1) thereof provided:

"An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of such a court given on appeal shall be heard by the appellate division or a full court as the case may be."

In *Zweni* this court considered s 20(1). At 532C-D Harms AJA explained:

"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" . . .."

He proceeded to say that in this context the word 'judgment' might have two meanings. The first was the reasoning of the court and the second its pronouncement on the relief claimed. He said that s 20(1) concerned only the second meaning. This was in accordance with the trite principle that an appeal lies against an order and not against the reasoning on which the order is based. Harms AJA famously concluded at 532I-533A:

"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".'[11]

[12] This Court in *DRDGOLD* proceeded to state:

'In *Western Areas* this court had occasion to consider the issue of appealability in accordance with the prescripts of s 39(2) of the Constitution. Howie P concluded as follows at para 28:

"I am accordingly of the view that it would accord with the obligation imposed by s 39(2) of the Constitution to construe the word "decision" in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable on the *Zweni* test but one which the interests of justice require should nevertheless be subject to

[11] Ibid para 19-20.

an appeal before termination of such proceedings. The scope which this extended meaning could have in civil proceedings is unnecessary to decide. It need hardly be said that what the interests of justice require depends on the facts of each particular case."

In *Philani-Ma-Afrika & Others v Mailula & Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) para 20, this court further developed the law in this regard by applying the reasoning in *Western Areas* to a civil matter. It said that 'what is of paramount importance in deciding whether a judgment is appealable is the interests of justice.'

Thus, the following legal position crystallised under the Supreme Court Act. An order that met the three *Zweni* requirements would be an appealable decision. In accordance with the general rule against piecemeal entertainment of appeals, an order that did not have all the *Zweni* attributes, would generally not be an appealable decision. Such an order would nevertheless qualify as an appealable decision if it had a final and definitive effect on the proceedings or if the interests of justice required it to be regarded as an appealable decision.'[12]

[13] The only question is whether the order of the high court should, in the interests of justice, be regarded as a 'decision' under s 16(1)*(a)* of the Superior Courts Act, and thus qualify as appealable. For the reasons set out below, I am of the view that it is not in the interests of justice that the appeal should be entertained. This is because, as will be demonstrated below, the agreed question of law bears no relation to the facts of the case.

[14] The instruction to Rudmans emanated from an email dated 2 June 2014 which Ms Cingo, the Trade and Industry Adviser of the DTI, sent to the State Attorney and copied to Rudmans, for the attention of Mr Percy Rudman. It read:

'Dear Sir

RE: THE DTI/UNICA IRON AND STEEL Pty Ltd

[12] Ibid para 23 and 24.

Your ref: New matter

Find herewith instruction to recover incentive payment that was made to the abovementioned entity as they were not in compliance with the guidelines of the Small Medium Enterprise Development Incentive Programme (SMEDP).

…

Rudman Attorneys are hereby appointed as per *your instruction attached*[13] to refer all incentive related recoveries to Rudman attorneys.' (Emphasis added.)

[15] Ms Cingo attached a previous email dated 4 May 2014, which was addressed by Mr Ramnarain, a State Attorney, to Ms Pretorius of the DTI. It contained the 'instruction' referred to in the 2 June 2014 email. The 4 May 2014 email, however, referred to an unrelated matter of Khabonina Guest House. Mr Ramnarain informed Ms Pretorius:

'…As you might be aware I am overseeing all of your related matters that has been outsourced to Rudman Attorneys. I guess on receipt of these instructions, I can only assume that either registration or an attorney from Mr van Rensburg['s] section transferred the documentation to me as I am overseeing all the incentive matters.

…I am also aware that there are many related matters of great value which Mr Rudman is already attending to. Do you not think that it will be practical and economical if he deals with this matter as well?'

[16] Understandably, Rudmans (represented by Mr Werner Fourie) requested clarity from Ms Cingo, in regard to the email of 2 June 2014 and its attachment. She responded in a second email on 2 June 2014 as follows:

'The email you referring to Werner its from the Office of the State Attorney giving the DTI the right to directly refer matters to your office, but it arose from the matter of Khabonina (your office already has instruction) which I think it [is] what might be causing confusion.

[13] This instruction was imparted to the DTI in an email dated 4 May 2014.

Please note that whenever a new instruction is forwarded that email will be attached. It [is] protecting the DTI and your office so to speak should a need arise.'

[17] This was, however, not what the 4 May 2014 email conveyed. It did not afford 'the right to directly refer matters' to Rudmans. In any event, such right or an 'instruction to refer all incentive related recoveries to Rudman attorneys' did not constitute a mandate from the State Attorney to Rudmans. Mr Fourie confirmed under oath that Rudmans had been appointed by the DTI to act in this matter.

[18] There was simply no evidence that the State Attorney instructed Rudmans. A supporting affidavit of Mr Ramnarain was never signed. Such an appointment would have required entering into a contract of mandate. There was no such evidence. The appellants conceded that there was insufficient evidence that the State Attorney had instructed Rudmans. It follows that, on the facts as outlined above, Rudmans was mandated by the DTI and not the State Attorney. The formulated question thus raises an abstract and academic issue. This Court does not determine such issues. Therefore, it is not in the interests of justice to entertain the appeal.

[19] In the result, the matter is struck off the roll with costs, including the costs of two counsel.

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WEINER JA

JUDGE OF APPEAL

Appearances

For appellants:	O A Moosa SC and A MacManus
Instructed by:	Pather and Pather Inc, La Lucia
	Claude Reid Attorneys, Bloemfontein.
For respondents:	M Mphaga SC with ACJ Van Dyk
Instructed by:	Rudman and Associates Inc, Pretoria
	Horn and Van Rensburg Attorneys, Bloemfontein.