

TAX

When is an order of a lower court appealable to a higher court?

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Until the recent decision of *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others*^[1] (TWK) it had become vogue for courts to resort to the “*interests of justice*” test to decide whether or not an order of a lower court is appealable to a higher court.

In so doing the courts ignored what had previously been held by the Supreme Court of Appeal (“SCA”), most notably in the unanimous judgment of Harms AJA (as he then was) in the matter of *Zweni v Minister of Law and Order*^[2] (*Zweni*)

In *Zweni* the court held that “*a ruling is the antithesis of a judgment or order*” and “*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*”

In TWK the SCA again dealt with the issue of when an order of a lower court is appealable to a higher court.

The background to TWK is in brief as follows: the Mpumalanga Division of the High Court upheld two exceptions taken by the defendants to the plaintiff's particulars of claim. The judgment of the Judge of first instance, upholding the exceptions was appealed to the full bench of Mpumalanga Division of the High Court, which subsequently dismissed the exceptions. Special leave to appeal was subsequently granted to the SCA. Before the SCA dealt with the appeal it asked the parties to file supplementary submissions to address the issue as to whether the dismissal of an exception is appealable. The SCA (per Unterhalter AJA) unanimously held that the dismissal of an exception is not appealable and consequently dismissed the appeal.

Although TWK was concerned with whether the refusal of an exception is appealable, the judgment is nevertheless instructive in regard to determining more generally the circumstances when an order of a lower court is appealable to a higher court.

In considering this issue the court considered whether the principles set out in *Zweni* had yielded to the “*interests of justice*” test. The court correctly concluded that they had not.

The court held that whilst it appreciates “*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*” that nevertheless 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 decisions that a court is likely to make*”.

The court held further that “*To adopt the interests of justice as the foundational basis upon which [the court] decides whether to entertain an appeal would put in a place a regime that is both unpredictable and open ended*”.

The court held that as a general principle the lower courts must bring finality to issues as envisaged by *Zweni* before the issues are capable of appeal to a higher court. Such an approach prevents piecemeal appeals that delay resolution of the matter and provides litigants with certainty as to when a matter is appealable.

The decision in TWK is to be welcomed as it reaffirms what was stated in *Zweni* and leaves no doubt in regard to the test to be applied when assessing whether an order of a lower court is appealable. TWK has conclusively held that the vague and uncertain “*interests of justice*” test is not the standard to be applied when assessing whether an order of a lower court is appealable. The court correctly held that (as was held in *Zweni*) the test is whether the order is final in effect, not open to being altered by the same court at a later stage, that it must grant definitive and distinctive relief and that it must dispose of a least a substantial portion of the relief sought in the proceedings.

Footnotes

[1] [2023] ZASCA 63

[2] 1993 (1) SA 523 (A)



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