THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 228/2013
Reportable

In the matter between:

ABSA BANK LIMITED **APPELLANT**

and

PETER JACOBUS JANSE VAN RENSBURG **FIRST RESPONDENT**

GINA MARI JANSE VAN RENSBURG **SECOND RESPONDENT**

and

ABSA BANK LIMITED **APPELLANT**

and

ELIZABETH FRANCINA MAREE **FIRST RESPONDENT**

STEFANUS MAREE **SECOND RESPONDENT**

Neutral citation: *Absa Bank Ltd v Van Rensburg* (228/13) [2014] ZASCA 34 (28 March 2014)

Coram: Maya, Shongwe, Leach, Saldulker JJA and Mathopo AJA

Heard: 10 March 2014

Delivered: 28 March 2014

Summary: Appeal – s 21A of the Supreme Court Act 59 of 1959 – a court of appeal will not entertain an appeal where the disputes between the parties have been settled and the order sought will have no practical effect or result – Appealability – an order postponing an application for default judgment to afford the plaintiff an opportunity to annex underlying documents to its simple summons is not appealable.

ORDER

On appeal from: Western Cape High Court, Cape Town (Griesel J, Fourie and Saldanha JJ concurring) sitting as court of appeal.

The appeal is struck from the roll.

JUDGMENT

Maya JA: (Shongwe, Saldulker JJA and Mathopo AJA concurring)

[1] This is an unopposed appeal against a postponement order of the full court of the Western Cape High Court, Cape Town (Griesel J, Fourie and Saldanha JJ concurring), with its leave. The appeal was heard and struck off the roll on 10 March 2014 and the court undertook that its reasons would follow. These are the reasons.

[2] The background facts are simple. The appellant (Absa) launched action proceedings against the respondents in the high court based on mortgage bonds registered in its favour over immovable properties belonging to the respondents. The respective claims were commenced by way of simple summonses to which were annexed copies of the relevant mortgage bonds and the deeds of suretyship signed by the spouses of the respective owners. In due course, the claims were set down for hearing as unopposed applications for default judgment. In those proceedings, a question arose whether or not it was necessary to attach to the

simple summonses the underlying credit agreements secured by the bonds and suretyships as had been required in some cases of that division.

[3] In light of divergent views on the question in the division, the matters were referred for hearing by the full court to obtain clarity as to the correct procedure to be followed. Absa denied the need to annex the underlying agreements to the summonses. It relied for its stance mainly on the absence of such a requirement in the Uniform Rules of Court (the rules) and the Consolidated Practice Note of the Western Cape High Court. It contended that the establishment of such a practice by the full court would effectively usurp the powers of the Rules Board which is constituted to make relevant prescriptions in the rules and specify the requirements applicable to a simple summons. And, in defended matters, the practice would necessitate the attachment of voluminous documentation both to simple summonses and the subsequent declarations. This would result in unnecessary duplication and expense, it was argued.

[4] The full court considered various authorities on the issue including judgments of its division and relevant practice in other large divisions. It came to the conclusion that the weight of authority favoured a view, which it adopted, that 'although a simple summons is not a pleading, it is nevertheless necessary, on a proper interpretation of [Uniform] rule 17(2)(b), read with Form 9, to attach a written agreement where the plaintiff's cause of action is based on such agreement'. To this finding the full court added two riders – that (a) it would not be compulsory for a plaintiff seeking a default or summary judgment to file the original agreement unless so directed by the court and (b) a plaintiff who relied on portion only of a voluminous written agreement could attach only such portion to the summons. The court then postponed the matters *sine die* with no order as to costs. The matters were postponed to afford Absa an opportunity to amend its

summonses so as to refer to the underlying credit agreements and annex them. It is the full court's reason for the postponement orders to which Absa objects.

[5] However, subsequent to the lodging of the appeal, Absa settled the two matters with the respective respondents. But this notwithstanding, it persisted with the appeal despite the resolution of all disputes between the parties.[1] It contended that the question of law at issue (ie whether it is necessary for a plaintiff who institutes action by way of an ordinary summons to annex the written agreement upon which its cause of action is based) is not confined to the parties *inter se* as the issue is likely to arise frequently. Thus, this court's judgment would still have a practical effect or result, so it claimed.

[6] Two preliminary issues that may each decide the fate of the appeal arise for determination. One is whether this court should hear the appeal at all in light of s 21A(1) of the Supreme Court Act 59 of 1959 (the Act).[2] The other is whether the matter is, in any event, appealable having regard to the nature of the orders appealed against.

[7] According to s 21A(1), if the issues in an appeal 'are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone'. These provisions set a direct and positive test: whether the judgment or order will have a practical effect or result and not whether it might be of importance in a hypothetical future case.[3] As a result, this court will not 'make determinations on issues that are otherwise moot merely because the

[1] It did withdraw the appeal partially in respect of the Van Rensburg matter but proceeded against the order granted in the Maree application.
[2] The Act has since been repealed and replaced by the Superior Courts Act 10 of 2013 which was assented to on 12 August 2013, after the institution of these proceedings. In terms of s 52 of the latter Act, the Act applies to appeals pending in any court at its commencement as if it had not been passed. Thus, the appeal must be decided under the provisions of the Act.
[3] *Premier, Provinsie Mpumalanga, en 'n ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA) at 1141E.

parties believe that, although the decision or order will have no practical result between them, a practical result could be achieved in other respects'.[4]

[8] But the section confers a discretion on this court.[5] Thus, in *The Merak S: Sea Melody Enterprises SA v Bulktrans*,[6] this court found that allowing the appeal would have no practical effect but nonetheless decided the merits of appeal. The court reasoned as follows:

'In view of the importance of the questions of law which arise in this matter, the frequency with which they arise and the fact that at the time of the decision in the Court *a quo* and of the granting of leave to appeal those questions were … "live issues", I am satisfied that this is an appropriate matter for the exercise of this Court's discretion to allow the appeal to proceed: *Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Others* 2001 (2) SA 872 (SCA) at 875 (para [8]) and *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA)'.

In *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie*,[7] this court once more decided the merits of an appeal – whether the termination of the right of residence of an occupier was just and equitable within the meaning of the s 8(1) of the Extension of Security of Tenure Act 62 of 1997 – where the occupier had vacated the property by the time the appeal was heard and had no interest in its outcome, which would have no practical effect for the parties *inter se*. The court considered the question of law involved, which arose frequently, important. It further took into account that the judgment appealed against, which was found wrong, had already been followed in a reported judgment.

So, depending on the facts of each case, while the parties may have resolved all their differences, a court of appeal may nevertheless entertain the merits of the

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[4] *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) para 6. See also, *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 (1) SA 47 (SCA); *Coin Security Group (Pty) Ltd v SA National Union for Security Officers* 2001 (2) SA 872 (SCA).

[5] *Coin Security Group (Pty) Ltd* above para 8; *President, Ordinary Court Martial, & others v Freedom of Expression Institute & others* 1999 (4) SA 682 (CC) para 13; *Land en Landbouontwikkelingsbank van Suid-Afrika* above, para 7.

[6] 2002 (4) SA 273 (SCA) para 4.

[7] Fn 4.

appeal if, for example, important questions of law which are likely to arise frequently are at issue and their determination may benefit others.[8]

[9] Elsewhere, utmost caution in exercising that discretion has been advocated. In an English decision, *R v Secretary of State for the Home Department, Ex Parte Salem*,[9] which has been considered by this court albeit without pronouncing a final view on its dictum,[10] as here, the discretion to adjudicate an appeal, where there is no longer a dispute between the parties, was strictly limited to the area of public law. And that court further circumscribed the discretion as follows:

'the discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'[11]

[10] Notably, the decisions in which our courts exercised their discretion in the appellants' favour and considered the merits of the appeals invariably concerned frequently arising questions of statutory construction and application.[12] In *Sebola v Standard Bank*,[13] upon which Absa relied, the Constitutional Court was requested to interpret and assess the constitutional impact of a statutory provision about which there had long been uncertainty which resulted in many conflicting high

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[8] See also *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) paras 18 to 21.

[9] *R v Secretary of State for the Home Department, Ex Parte Salem* [1999] 2 WLR 483 (HL) ([1999] 2 All ER 42 (HL)).

[10] In *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) at 247E-I.

[11] Above n7, at 487 and 47c, respectively.

[12] In *The Merak S Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA), the issue considered important and arising frequently by the court was whether a bank guarantee given to secure the release of an arrested vessel constituted 'security' for purposes of s 5(2) of the Admiralty Jurisdiction Regulation Act 105 of 1983. *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* concerned the interpretation and application of s 8(1) of the Extension of Security of Tenure Act 62 of 1997, as indicated.

[13] *Sebola v Standard Bank of South Africa* 2012 (5) SA 142 (CC).

court decisions. The court came to the decision that it was in the interests of justice to hear the appeal on its merits.[14] In reaching that decision, the court noted that the appellants' costs incurred in resisting the sale of their home, the subject of the dispute, which the bank did not tender, and the bank's own costs in the Constitutional Court which it threatened to recover if they persisted with the appeal, remained a live issue for them. But the court reiterated that a dispute about costs alone is insufficient reason to hear an appeal whose issues have gone dead. What it considered pivotal in the enquiry was the meaning it would assign to the statutory provisions, which would have a significant practical impact.[15] And the court took into account that the Supreme Court of Appeal, whose controversial decision was appealed against, had not had the benefit of the wide-ranging submissions made to it on the constitutional impact of the various interpretations contended for. These factors vastly distinguish the case from the present one.

[11] At stake here is the precise requirement of a rule of court procedure. Bearing in mind that s 21A was aimed at reducing the heavy workload of appellate courts,[16] it is very relevant that there is a statutory body specially created to deal with all issues pertaining to matters of this nature, as pointed out by Absa itself. The Rules Board for Courts of Law Act 107 of 1985 (the Rules Board Act) is chiefly aimed at providing 'for the making of rules for the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, High Courts and lower courts'.[17] This object is achieved through the Rules Board for Courts of Law (the Rules Board)[18] which is empowered, inter alia, 'from time to time on a regular

[14] The provisions of the Act, including s 21A, did not apply to the Constitutional Court which uses a different yardstick, the interests of justice test, in deciding whether to hear an appeal whose issues have gone dead.
[15] See also *MEC for Education, KwaZulu-Natal & others v Pillay* 2008 (1) SA 474 (CC) paras 32 to 35; *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) at fn 18; *JT Publishing (Pty) Ltd v & another v Minister of Safety and Security & others* 1997 (3) SA 514 (CC) para 15.
[16] *Premier, Provinsie Mpumalanga, en 'n ander v Groblersdalse Stadsraad*, fn3 at 1141D.
[17] As set out in its preamble.
[18] Established under s 2 of the Rules Board Act.

basis [to] review existing rules of court and subject to the approval of the Minister, make, amend or repeal rules … regulating the practice and procedure in connection with litigation … [and] the form, contents and use of process'.[19] The present question falls squarely within this ambit and any uncertainty relating to the relevant rule's application should rightly be resolved by the Rules Board.

[12] Furthermore, this court has repeatedly cautioned against deciding a matter without the benefit of tested argument from both sides on questions that are necessary for the decision of the case.[20] A decision on the merits of this appeal would be based on the argument of only one of the parties. In these circumstances, Absa has established no reason for this court to exercise its discretion in its favour and entertain the merits of the appeal.

[13] Despite this finding, which effectively disposes of the appeal, it is necessary to deal briefly with the other fundamental hurdle faced by Absa. Recently, in an analogous judgment in *Absa Bank v Mkhize*,[21] this court had occasion to pronounce on the nature and effect of an order postponing the hearing of an application for default judgment in order to give the plaintiff an opportunity to take further steps to augment its case, as was done here. The majority held that such an order is merely a direction from the high court, before the main action can be entered into, as to the manner in which the matter is to proceed; it does not amount to a refusal of default judgment nor does it directly bear upon or dispose of any of the issues in the main action and is thus not a dismissal of the action.[22] Reiterating the trite fact that an appeal lies against the substantive order made by the court and not the

[19] Section 6(1)(*a*) and (*b*) of the Rules Board Act.
[20] See, for example, *Western Cape Education Department & another v George* 1998 (3) SA 77 (SCA) at 84E; *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 11.
[21] *Absa Bank v Mkhize* [2014] All SA 1 (SCA).
[22] Paras 59, 62 and 63.

reasons for the judgment,[23] the majority concluded that the order was therefore not appealable. Needless to say, this judgment binds us and the appeal must fail on this ground too.

[14] For these reasons the appeal was struck from the roll.

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MML MAYA

JUDGE OF APPEAL

Leach JA:

[15] My conclusion that the matter had to be struck from the roll was reached by a somewhat different route from that followed by my learned colleague, Maya JA. She has concluded that the issues raised upon appeal became moot when the parties settled their litigation and that the order of the court below was in any event not appealable. I agree with the latter conclusion for the detailed reasons she has given. But, in my view, the effect of the settlement was not to render the issues between the parties moot; instead it brought an end to the litigation, thereby removing the disputes that had existed from the jurisdiction of the court.

[16] Had the claims been dismissed, that would have constituted a final judgment that was appealable; but the order granted was no more than interlocutory in nature. Consequently, although the appellant may have had reason to feel

[23] Para 64; *Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.

aggrieved, it could not appeal against the order of postponement for the reasons given by Maya JA. Moreover, the court below erred in granting leave to appeal to this court; and its reason for doing so, namely, that the order was of final effect in that 'default judgment on the papers as they stand had to be refused' is insupportable.

[17] However, the appeal was overtaken by events when the parties settled the action. In my view, that was the end of the matter and, in truth, the issue whether leave to appeal ought or ought not to have been granted in itself became moot.

[18] In reaching that conclusion, I found the reasoning of this court in *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) to be most persuasive. In that matter the appellant had been sued by the respondent for damages suffered as a result of injuries sustained by her when she fell into a manhole. The respondent succeeded both in a magistrate's court as well as on appeal to the high court. After leave to appeal further to this court had been granted, the parties concluded a settlement agreement that effectively resolved all their differences resulting in there being no longer any dispute or *lis* between them. The preliminary question which then arose before this court was whether the appeal should be entertained at all. In regard to that question and the provisions of s 21A(1) of the Supreme Court Act 59 of 1959, Brand JA, in delivering the unanimous judgment of this court, stated the following:[24]

'It can be argued, I think, that s 21A is premised upon the existence of an *issue* subsisting between the parties to the litigation which requires to be decided. According to this argument s 21A would only afford this Court a discretion not to entertain an appeal when there is still a

[24] At para 7.

subsisting *issue* or *lis* between the parties the resolution of which, for some or other reason, has become academic or hypothetical. When there is no longer any *issue* between the parties, for instance because all issues that formerly existed were resolved by agreement, there is no "appeal" that this Court has any discretion or power to deal with. This argument appears to be supported by what Viscount Simon said in *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 (HL) at 114, when he said, with reference to facts very similar to those under present consideration:

". . . I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."

Consequently, he found that in a matter where there was no existing *lis* between the parties the appeal should be dismissed on that ground alone (at 115). (See also *Ainsbury v Millington* [1987] WLR 379 (HL) at 381.) More recently, however, it was said by Lord Slynn of Hadley in *R v Secretary of State for the Home Department, Ex parte Salem* [1999] 2 WLR 483 (HL) at 487H ([1999] 2 All ER 42 at 47*c*) that:

". . . I accept . . . that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*."

It is true that Lord Slynn immediately proceeded to confine this discretion to entertain an appeal, where there is no longer a *lis* between the parties, to the area of public law and added that the decisions in the *Sun Life* case and *Ainsbury v Millington* must accordingly be read as limited to disputes concerning private law rights between the parties to the case (at 487H - 488A (WLR) and 47*c* - *d* (All ER)).'

[19] Although Brand JA went on to leave the point open – the court decided to assume it could still exercise a discretion to hear the appeal and proceeded to dismiss it under s 21A(1) – his reasoning set out above seems to me to be unassailable, especially as in this case there is no issue involving 'a public authority as to a question of public law' but a dispute as to procedure. Consequently, after the settlement, there was no 'living issue' between the parties

and, in my view, this court could no longer entertain any of the issues that arose before the settlement.

[20] I am aware of certain decisions, three in particular, that may arguably support a contrary conclusion. Closer examination however shows that not to be the case.

(a) The leading example is *Sebola v Standard Bank* 2012 (5) SA 142 (CC), but as Maya JA points out in that matter there was in fact a live issue in respect of costs still in dispute between the parties. Nothing further needs be said about the decision in that case.

(b) In *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) the appellant appealed against a high court order setting aside an order granted by a magistrate evicting the respondent from certain premises. The respondent vacated the property before the appeal in this court was heard and to that extent allowing the appeal would have no practical effect. This court, however, declined to dismiss the appeal under s 21A(1), inter alia as the questions of law it raised were of importance. In that case, too, however, the matter had not been settled and there were still live issues between the parties, including the costs in the magistrates' court (the respondent had been ordered to pay such costs but that order had been set aside by the high court) as well as the costs in the appeal from the high court. This court was therefore called on under s 21(A)(1) to exercise a discretion it had to determine issues that were still live and had not been settled by the parties.

(c) In *The* Merak S: *Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA) the appellant, whose application to a

high court for a reduction of a bank guarantee provided to procure a ship's release from attachment had been dismissed, appealed against that decision to this court. The ship had been attached to provide security for claims the respondent intended pursuing against the appellant in arbitration proceedings in London. After the high court had granted leave to appeal, it appeared that the respondent did not intend to proceed with the arbitration proceedings and the appellant obtained an order from another court that the guarantee it had provided be returned to it. Despite this, and the fact that in these circumstances the appeal to this court against the refusal to reduce the guarantee would have no practical effect, this court heard the appeal and set aside the high court's order. It did so as at the time of the high court's order and the granting of leave to appeal the issues were 'live' and the matter raised important questions of law that frequently arise.[25] Not only was there no settlement between the parties of the dispute that was the subject of the appeal but, as in both the cases previously mentioned, the costs that had been incurred on appeal was still a live issue at the hearing of the appeal. And although the costs in the court of first instance were not mentioned in the judgment of this court, the appellant had been ordered to pay them as appears from the reported judgment of the court a quo[26], and that order was set aside by this court at the end of the day. Thus in this case, too, the issue of costs was still live issues between the parties when the matter came before this court.

[21] In the present case there are no live issues between the parties after the settlement. This distinguishes the matter from all three of the decisions I have mentioned, in each of which there had been no settlement after leave to appeal had

[25] Para 4.
[26] See *Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* (*The* "Merak S") [2000] 1 Lloyd's Rep 619 [SA Ct].

been granted and in which there were still live issues when the appeal came before this court. They therefore throw no doubt upon the reasoning of Brand JA in *Port Elizabeth Municipality v Smit* to which I have referred, and I have been unable to find any other authorities that do. Whilst I accept that the views of Brand JA on this issue were obiter, I see no reason not to follow them. Indeed I did not understand counsel for the appellant to dispute that this court could not entertain the appeal post settlement.

[22] Accordingly, in my view, once the parties settled, the litigation terminated and there were thereafter no disputes between them upon which this court could exercise its appellate jurisdiction. That being so, there was no room for this court to exercise its discretion under s 21A(1) to dismiss the appeal as there was no appeal before it to dismiss. All it could do was to remove the matter from its roll.

[23] In the light of what I have said, I am of the view that had the parties not settled the action, this court would probably have refused to hear the appeal as the order of the court below was not appealable. But in the light of their settlement after leave to appeal had been granted, the litigation between them came to an end and there was thereafter nothing for the court to adjudicate upon (including, for that matter, any dispute as to whether the order was appealable or not). It is simply for this reason that, in my view, the appeal had to be struck from the roll.

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L E Leach

Judge of Appeal

APPEARANCES:

For Appellant:	LM Olivier SC (with FSG Seivers)
	Instructed by:
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	Symington De Kok, Bloemfontein

No appearance for the respondents