



**THE REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE HIGH COURT, CAPE TOWN**

**CASE NO: 21218/2008**

In the matter between:

**POLYOAK PACKAGING (PTY) LTD**

Plaintiff/Respondent

and

**ESKOM HOLDINGS LIMITED**

Defendant/Applicant

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**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL: 26 MAY 2011**

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**KOEN AJ**

1. This is an application for leave to appeal the whole of the judgment and order handed down by me in this matter on 24 March 2011.

2. For convenience I intend to refer to the parties in the same manner employed in my judgment, namely as Eskom and Polyoak.
3. The exception involved primarily the question whether Eskom owed a legal duty to Polyoak, the breach of which would give rise to delictual liability. I held that the question should not be determined without evidence about certain aspects of the case<sup>1</sup> being placed before a trial court. What I did not do is hold that no such duty existed.
4. It is apparent from the judgments of the SCA in *Maize Board v Tiger Oats Ltd and Others*<sup>2</sup> and *Minister of Safety and Security and another v Hamilton*<sup>3</sup> that the question whether the dismissal of an exception is appealable has been a controversial one. The answer to the question has often proved to be unpredictable<sup>4</sup>. But it is now clear enough that a judgment which postpones a consideration of the merits of an exception like the one in this case until a trial, because it is unwise to determine whether or not a legal duty exists without evidence, is not appealable<sup>5</sup>.
5. It was argued on behalf of Eskom that the interests of justice warrant that the issue of a legal duty be dealt with on exception. In this case, it was argued, the interests of justice would be served through the avoidance of a long and costly trial.

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<sup>1</sup> These are dealt with at paragraph 50 of the judgment

<sup>2</sup> 2002 (5) SA 365 (SCA)

<sup>3</sup> 2001 (3) SA 50 (SCA)

<sup>4</sup> See, for example, *Hamilton* at paragraphs 5,6 and 7

<sup>5</sup> See *Hamilton* at paragraph 12

6. As authority for the submission reference was made to the decisions in a number of cases<sup>6</sup> which make the point, in essence, that an appeal should not be denied, even before the proceedings end, if the interests of justice demand it. I do not think that there can be a quarrel with this proposition.
7. Where I part company with the submission is when it gets to the next stage, namely that the interests of justice require that an appeal should be granted in this matter, because our law has developed to the extent that the unambiguous expression of the rule that the dismissal of an exception is not appealable in *Tiger Oats* and *Hamilton* (and affirmed only four or so years ago in *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others*<sup>7</sup>) is no longer part of it.
8. There is nothing in *Tiger Oats* or *Hamilton* which leads me to believe that the SCA left out of account any consideration of the interests of justice when those decisions were made. The interest at stake is the speedy and cost effective resolution of disputes. The SCA was mindful of this consideration, as I read *Tiger Oats*, because it said that other mechanisms exist so that this result can be achieved. It referred to the fact that resort can be had by the parties to the procedure provided for in Rule 33, or by the stating of a case for decision, if the case is amenable to these procedures, and the issues are sufficiently discrete<sup>8</sup>.

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<sup>6</sup> *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA); *Philani-Ma-Afrika and Others v Mailula and Others* 2010 (2) SA 573 (SCA); *NDPP v King* 2010 (2) SACR 146 (SCA); *Health Professions Council of South Africa v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA); *AB Ventures Ltd v Siemens Ltd* [2011] ZASCA 58 (31 March 2011).

<sup>7</sup> 2007 (5) SA 491 (SCA)

<sup>8</sup> See paragraph 14 of the judgment in *Tiger Oats*



9. In my view *Tiger Oats*, *Hamilton* and *Gutsche*, are clearly binding on me. They are in point, unequivocal, and embrace the overriding principle that appeals will not be denied where an injustice would result.
10. In the circumstances I do not think that the application can be granted.
11. The parties were agreed that any costs order which might be made should include the costs of two counsel.
12. I therefore make the following order:

The application is dismissed with costs, including the costs of two counsel.



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S.J. KOEN AJ