Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case No. A258/2018

Trial Case No. 4500/2014

Before: The Hon. Mr Justice Bozalek
The Hon. Mr Justice Binns-Ward
The Hon Ms Justice Boqwana

Hearing: 1 February 2019
Judgment: 6 February 2019

In the matter between:

JUAN A. JACOBS **Appellant**

and

BEACON ISLAND SHAREBLOCK **First Respondent**
SOUTHERN SUN HOTEL INTERESTS (PTY) LTD **Second Respondent**

JUDGMENT

BINNS-WARD J (BOZALEK and BOQWANA JJ concurring):

[1] This matter should never have had to come before the court a quo; even less so before us on appeal. It tells a story of how litigation should *not* be conducted.

[2] It arises out of an application for interlocutory relief brought by the defendants (who are the respondents in the appeal) in a still pending action, in which the plaintiff claims compensation for the injuries that she allegedly sustained when a jammed shower door shattered as she was attempting to open it. The incident occurred while the plaintiff was a guest in one of the units at the Beacon Island Hotel resort at Plettenberg Bay. The resort is

owned by the first defendant, a share block company; and is managed and operated by the second defendant. The claim is founded on the alleged wrongful and negligent failure by the defendants to properly maintain the shower door.

[3] The defendants have denied liability. They have also joined the plaintiff's father and mother as first and second third parties, respectively, in the action. The plaintiff's father, Juan Albertus Jacobs, who is the appellant before us, is the holder of a timeshare use right in the hotel unit concerned. He was joined on the grounds that he had allegedly bound himself contractually to indemnify the first defendant against any liability it might incur in respect of the sort of claim brought by the plaintiff.

[4] The annexure to the defendants' third party notice recited in outline the nature of the plaintiff's claim against the defendants, and recorded that the defendants had denied liability on the grounds set forth in their plea. It then proceeded, in paragraphs 7 and 8 thereof, as follows:

> 7. The Defendants incorporate by reference all allegations as contained in the Plaintiff's particulars of claim as are admitted in their plea, together with all further allegations in their plea.
>
> 8. In particular, the First Defendant alleges that the Third Party is liable to indemnify it in terms of clause 7.5 of the Use Agreement as read in conjunction with the "*C-form*", against any loss, damage or injury which any person using the premises sustained in the premises by reason of any act whatsoever, or neglect on the part of the First Defendant or the First Defendant's servants, as well as against any loss, damage or injury of any description sustained by reason of the premises at any time falling into a defective state, or by reason of any repairs, renovations and/or maintenance work to the rest of the property effected or to be effected by the First Defendant or by any other user thereof, or by reason of such repairs, renovations and maintenance work not being effected timeously or at all.

The 'C-form', a partly legible copy of which is annexed to the defendants' plea, appears to be a pro forma document drafted for execution by the transferee of any shares in the first defendant that give a right to the occupation of a unit in the Beacon Island resort share block scheme. It appears from the copy of the 'C-form' annexed to the defendants' plea that the deed was executed in respect of the transfer to the first third party of certain ordinary shares in the first defendant company from the estate of the late Mrs Cornelia Jacobs. Insofar as can be made out (because part of the wording is blocked out by what appears to have been a

sticker affixed to the document[1]), clause 3 thereof provides that the transferee, by signing the document, agrees and undertakes to assume and discharge all the obligations imposed upon and accepted by the holder/transferor under the use agreement/s and articles of association. A statutory context for the contractual undertaking is to be found in s 7(2) of the Share Blocks Control Act 59 of 1980, which provides '*The articles of a share block company shall provide that a member shall be entitled to the use of a specified part of the immovable property in respect of which the company operates the shareblock scheme, on the terms and conditions contained in a use agreement entered into between the company and such member*.' A copy of what is alleged to have been the relevant use agreement was attached as annexure B to the defendants' plea.

[5] The '*further allegations in* [the defendants'] *plea*' incorporated by reference in terms of paragraph 7 of the annexure to the third party notice that appear to be germane are the following:

Para 4.2	The First Defendant specifically pleads that the Plaintiff was a guest of her father, Juan Albertus Jacobs (*"the holder"*), at the time that the incident occurred on 2 April 2012.
Para 4.3	The holder held a use right in the First Defendant in terms of the Share Blocks Act 59 (sic)[2] by virtue of clause 3 of an agreement of cession and use dated 10 February 2010 ("*C form*" – annexure "**A**"), as read with the relevant Use Agreement entered into in terms of section 7 of the Share Blocks Act, a copy of which is attached as annexure "**B**" ("*the Use Agreement*").
Para 4.4	In terms of clause 3 of the "*C form*", the holder agreed and undertook to assure[3] and duly discharge all the obligations imposed upon and accepted by the First Defendant in terms of the Use Agreement. The holder was further registered as a shareholder of the First Defendant in terms of a share certificate attached as annexure "**C**", and bound by the First Defendant's articles of association (annexure "**D**") ("the Articles of Association").
Para 5.7.1	The Defendant specifically pleads that, to the extent that it may be held that the shower door or any other fixtures and fittings relating to the shower were defective, or had been improperly maintained, or that the Defendants were in any way negligent as alleged:

[1] An unobscured copy of the pro forma document was made available to us by the respondents' counsel, for which we were grateful, but I consider it preferable to treat of the document as it appears in the pleadings.

[2] An evidently intended reference to the Share Blocks Control Act 59 of 1980.

[3] The word '*assure*' is taken from the text of the relevant agreement. It appears to be a typographical misprint. The word '*assume*' was plainly intended.

Para 5.7.1.1 Such maintenance was the responsibility of the holder and not the Defendants in terms of the "C-form" as read with the Use Agreement, and in any event the holder agreed that the use of the unit for the week would be on a "voetstoots" basis without any warranties, express or implied, and that the unit would be in the condition in which it presently stood at the commencement of the holder's use thereof.

[6] The first third party pleaded to paragraph 7 and 8 of the annexure to the third party notice as follows in paragraphs 1 and 2 of his plea:

1. **Ad paragraph** (sic) **1-7 thereof:**

   The contents of these paragraphs are admitted.

2. **Ad paragraph 8 thereof:**

   2.1 The contents thereof are denied.

   2.2 In amplification of the aforesaid denial, but without detracting from the generality thereof, the First Third Party alleges that:

   2.2.1 in terms of clause 6 of the Use Agreement, as read in conjunction with the "C Form", the First Third Party was not permitted to, *inter alia*, tamper with any fittings connections or plumbing serving the premises;

   2.2.2 in terms of clause 7.1.1 of the Use Agreement, as read in conjunction with the "C Form", the First Defendant had a duty to procure the due maintenance and repair of the entire premises, including, without limitation, inter alia, all fittings and attachments, plumbing installations, piping and apparatus of all fittings whatever and all window frames, fittings and doors in good and sound order and repair, the First Third Party having no liability therefore (sic);

   2.2.3 in terms of clause 7 of the Use Agreement, as read in conjunction with the "C Form", the First Defendant had a duty to repair and maintain the premises in good, secure, clean and thoroughly tenantable order and condition from time to time and as and when necessary or requisite to renovate and renew the same;

   2.2.4 as a result of the aforesaid, the First Defendant had a general duty of care to ensure that the premises were properly maintained and inspected at all times and in particular, to ensure that the premises were safe at all times for use by all person/s (sic) entering or exiting the shower in the suite, more particularly on the day in question;

> 2.2.5 in particular, but without derogating from the generality of the aforesaid, the First Defendant had a duty of care to ensure that the premises were in a fit and proper condition, and free from defects at all times.

[7] In accordance with the practice in this division of the High Court, the action was taken under judicial case management once the pleadings were closed. The case manager judge gave directions, amongst other things, concerning the dates by which any particulars required for purposes of trial were to be requested and furnished by the parties. It was subsequently reported to him that the dates he had fixed had come and gone without any of the parties having requested such particulars; it being therefore accepted that none of them required them. On the basis of such assurance, the case manager judge issued a trial-readiness certificate, and the date of 6 March 2018 was consequently allocated by the registrar for the commencement of the trial.

[8] In disregard of the case management scheme, the defendants subsequently delivered a request for trial particulars to the third parties on 30 January 2018. The first third party's reply to the request was delivered on 13 February 2018. The plaintiff also delivered a last minute request for trial particulars.

[9] At paragraph 16 of their belated request for trial particulars the defendants asked:

> Does the First Third Party deny its obligation to indemnify the First Defendant as per clause 7.5 of the Use Agreement? If so on what basis?

To which the first third party responded in paragraph 27 of his reply:

> Yes. First Third Party has never seen the 'Use Agreement', nor is he a party to such agreement.

(Quite why it was thought necessary by the defendants to obtain further particulars in this regard is by no means clear. The first third party's plea expressly denied liability in terms of clause 7.5; and it also set out, with reference to the alleged effect of other specifically identified clauses of the use agreement, the basis of the denial.)

[10] It was as a consequence of the defendants' request for trial particulars and the third party's reply thereto that the action that had been certified trial-ready many months earlier was subsequently, at a very late stage, alleged by the defendants actually not to be so. The defendants contended that the first third party's denial in paragraph 27 of his reply to their request for trial particulars stood in contradiction of his admission in paragraph 1 of his plea of 'the further allegations' in the defendants' plea quoted in paragraph [5] above. They complained that this had embarrassed them in their preparation for trial. The upshot was that,

instead of proceeding to trial on the pleaded case on 6 March 2018, the defendants brought an application on that date in which orders were sought –

1. Striking out paragraph 27 of the First Third Party's response to the Defendants' trial particulars (sic) dated 13 February 2018 ("*the response*")

2. Alternatively to paragraph 1 above:

   2.1 Postponing the trial of this matter *sine die*; and

   2.2 Directing the First Third Party to amend his pleadings in terms of rule 28 so as to cure the embarrassment caused by paragraph 27 of the response.

3. Directing the First Third Party to pay the costs of this application, and, in the event that the alternative relief claimed in paragraph 2 above is granted, any wasted costs of the postponement; and

4. Granting such further and/or alternative relief as may be necessary or appropriate.

[11] The court a quo entertained the application and, on 7 March 2018, directed that an order should issue as prayed in terms of paragraphs 2.1, 2.2 and 3 of the defendants' notice of application. It is from that decision that the first third party comes on appeal to the full court with the leave of the learned judge at first instance.

[12] It is evident from the reasons for the order furnished by the learned judge a quo that she read the third party's plea to the annexure to the third party notice as having admitted 'the further allegations' quoted above, with the attendant implication that the first third party had not placed in dispute the defendants' allegation that he was bound by the use agreement. The judge considered that that much followed from the unqualified admission in paragraph 1 of his plea quoted above.[4] The judge then referred to the defendants' characterisation of the response furnished by the first third party in paragraph 27 of his reply to the defendants' request for trial particulars as an effective withdrawal of the pleaded admission. She appears to have accepted the defendants' assertion that this required them at a late stage to prove matter that had hitherto been common ground on the pleaded case. Consistently with that view of the matter, the judge rejected the first third party's contention that the information provided in his trial particulars did not contradict the admission in his plea. She held that in the result, '[a]s the pleadings stand, the case [the defendants have] to meet is contradictory and ambiguous'. Having concluded that the pleadings were contradictory, the judge

[4] In paragraph [6].

expressed herself to be 'satisfied that the defendant would be prejudiced if the matter proceeds on trial with the pleadings as they stand'.

[13] It is convenient at this stage to consider briefly the substance of the defendants' application to the court a quo.

[14] The postponement they sought was allegedly to allow them to address the prejudicial circumstances in which they contended the first third party's trial particulars had placed them. According to their supporting affidavit that would be achieved by giving them time to assemble the evidence necessary to prove that the first third party had undertaken to be bound by the use agreement.

[15] It will be recalled that they also sought a direction that the first third party should amend his pleadings. Quite how the pleadings were required to be amended was not specified in the defendants' supporting affidavit. Indeed, after a discursive rehearsal of the pleadings and the trial particulars that had been furnished, the deponent to the defendants' supporting affidavit concluded: 'Based on the above it is clear that the defence advanced on the pleadings is excipiable. It is at best vague and embarrassing but – as a practical reality – does not disclose any defence'. That statement begged the obvious question, 'Well, if so, why not deliver a notice of exception, instead of seeking the relief sought in terms of paragraph 2.2 of the notice of application?' The defendants' application did not identify the question or offer an answer. It also did not contain any indication of what should happen in regard to the further conduct of the action should the first third party fail to comply with any direction given by the court in terms of paragraph 2.2 of their notice of application.

[16] The institution of the application was misconceived and led by concatenation to an order that in material part was nugatory. It seems to me, with respect, that both the court a quo and the parties were led into error by a failure to recognise that a litigant's reply to a request for trial particulars does not form part of the pleadings.

[17] A succinct analysis of the conceptual position that actually obtains in this type of situation is to be found in *Ruslyn Mining & Plant Hire (Pty) Ltd v Alexkor Ltd* [2011] ZASCA 218; [2012] 1 All SA 317 (SCA). *Ruslyn* concerned a case in which the plaintiff had sought, unsuccessfully, to apply for an amendment to the further particulars that it had furnished for the purposes of trial. It made the application during an argument by the defendant for absolution from the instance at the end of the plaintiff's case. The purpose of the amendment that was sought was to bring the trial particulars that it had furnished into line

with evidence that had already been led, without objection, during the plaintiff's case. The judge at first instance had refused the application on the basis of his appreciation of the principles applicable to the amendment of pleadings, treating the further particulars for practical purposes as if they were a pleading. Absolution from the instance was granted. On appeal, the order of absolution from the instance was reversed. The order refusing the application to amend the trial particulars was confirmed, however; not because an amendment of the trial particulars had been inappropriate or impermissible, but on the basis that the application to amend them had been an inappropriate and unnecessary proceeding, in respect of which the court below did not need to have made an order.

[18] At paras. 18-19 of its judgment in *Ruslyn*, the appeal court held as follows:

> 18. To deal first with the principle, … . Further particulars for trial are not pleadings. The opportunity to request them arises after the close of pleadings: uniform rule 21(2). They are limited to obtaining information that is strictly necessary to prepare for trial. They do not set up a cause of action or defence by which a party is, in the absence of amendment or tacit concurrence, bound and by which the limits of his evidence are circumscribed. Nor can they change an existing cause of action [or defence[5]] or create a new one (as the trial judge appears to have believed). … Because they are not pleadings, they do not limit the scope of the case being made by the party that supplies them. A party has a right to rely on all and any evidence that is admissible and relevant to his pleaded cause or defence and …
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> 19. Applications to amend particulars for trial seem to me to be largely inappropriate and unnecessary, particularly once the trial has got under way. It should be sufficient for counsel to notify his opponent at an early stage when he becomes aware that his evidence may depart materially from the information in the particulars for trial. The latter can then take the matter up with the trial court if necessary. …

[19] In describing how the application to amend its trial particulars that had been brought by the plaintiff fell to be dealt with, the appeal court in proceeded as follows (at para. 21):

> The application being unnecessary, the wasted costs generated by it should have been held to the account of [the plaintiff]. These however should not include [the defendant's] costs of opposition, as it had precipitated the application by its contention that [the plaintiff's] case was restricted by the trial particulars and this was aggravated by its determined resistance to the amendment, which not only served no purpose in the circumstances but was predicated upon principles that related to amendment of pleadings.

[5] My insertion.

At para. 35, the court concluded that as the application to amend the trial particulars had been unnecessary the court below should have refused it.[6]

[20] The parallels between the issues raised by the defendants' application to the court a quo in the current matter and those determined in the relevant part of *Ruslyn* are starkly evident. It should have been apparent that the first third party could not, and did not, by anything he said in paragraph 27 of his reply to the defendants' request for trial particulars, effectively withdraw the admissions incorporated in paragraph 1 of his plea to the defendant's third party notice. The pleaded case remained unaltered.

[21] It is not for us to decide the question definitively, but I am inclined to agree with the court a quo's assessment, and that of the defendants, that the answer given in paragraph 27 was essentially contradictory of the defence pleaded by the first third party in his plea. In my view, a fair reading of the plea conveys that the defendant admitted being bound by the use agreement, but contended that the indemnity provided for in terms of clause 7.5 of that agreement was not applicable because of what he contended was the effect of the other identified clauses in the agreement. In the context of the pleaded defence, evidence that the first third party had not seen, nor been party to the use agreement would be irrelevant, and liable to exclusion on that account at the trial. It was not necessary that the first third party should have seen, or been party to, the use agreement for him to effectively, by subscribing to the 'Form-C' document, have assumed the obligations of a predecessor in title as owner of the shares in the share block company. What rendered the reply to the request for trial particulars contradictory of the plea, in my opinion, was its implication that the first third party was not bound by clause 7.5 because he had not seen or been privy to the use agreement. That implication contradicted his pleaded admission that he *had* assumed the holder's obligations in terms of the use agreement.

[22] But, as I have sought to explain, the contradiction should not have been seen as posing an embarrassment to the defendants. On the contrary, because any evidence that the first third party might seek to adduce at the trial in contradiction of his pleaded admissions would fall to be excluded as irrelevant, any embarrassment that might arise would rather be that of the first third party. And the fact that his ability to procure an amendment of his plea after the commencement of the hearing might be adversely affected by his having rejected the opportunity to do so given to him in correspondence on the point between his attorneys and

[6] As the court of first instance had in fact refused the application, I think it is clear enough from the context that the appeal court intended to convey that the court below should have made no order, save as to costs.

those of the defendants before the institution of the defendants' application would only add to his embarrassment.

[23] There was in truth, as in *Ruslyn* supra, therefore no reason for the defendants to have brought the application. They were entitled to enter into the hearing on the basis of the pleadings, and to object at the trial to any attempt by the first third party to adduce any evidence at variance with the import of his pleaded case. Their legal representatives had done all that they reasonably could have been expected to do in the circumstances by pointing out to the first third party's representatives the difficulty that could arise from the third party's apparent intention to rely on a defence that had not been pleaded and was in conflict with the defence that had been pleaded.

[24] The learned judge a quo clearly recognised, however, that the situation was pregnant with potential difficulty, and that a disruption to the trial was eminently foreseeable if the first third party were subsequently to seek to amend his plea to incorporate the new defence adumbrated in his reply to the request for trial particulars. It was evidently in order to avoid that happening that she directed that the first third party should amend his pleadings before the trial began. The judge's clear and commendable intention was to engineer a situation in which the trial could commence on pleadings that fully and clearly defined the first third party's apparent defences, and on which the defendants should be given ample opportunity to be properly prepared.

[25] Assuming that he does intend to contend that he was not bound by the use agreement because he had not seen or been privy to it, as the trial particulars that he furnished suggest, the first third party would have been well advised to have taken the opportunity to have ordered his pleaded case in accordance with the judge's indications, rather than seeking to attack the decision on appeal. Indeed, had the parties participated conscientiously in the case management process and dealt with the matter of trial particulars in compliance with the case manager's directions, the issue that gave rise to the application to the court a quo, and indirectly to this appeal, could have been dealt with by the case manager judge in the cost-effective and relatively informal context of the case management process. It would in all probability have given rise to a direction by the case manager judge that the parties should draw up a statement of issues and a subsequent direction, if needs be, that the litigants should bring their pleadings into line with such issues if a divergence between them and the pleaded case were identified. The judge would, of course, not have been able to order the parties how to plead, but he could have indicated that a trial-readiness certificate would not be

forthcoming while there remained confusion or uncertainty as to exactly what the triable issues in the case would be; alternatively, have certified the matter trial-ready, subject to a note to the allocating and trial judges of the first third party's recalcitrant failure to clearly plead his apparent defences. Proper engagement in the case management process is directed, amongst other things, at the avoidance of the last minute confusion and consequent wastage of court time and litigants' money that occurred in the current matter.

[26] The only substantive respect in which I consider that the court a quo erred was to make the order sought in terms of paragraph 2.2 of the application, instead of perhaps merely allowing a postponement and, in the course of its reasons for doing so, explaining that the first third party would be well advised to amend its plea if he intended to pursue a defence that he was not bound by the use agreement. (In doing so, the judge a quo would have essentially been assuming a case management function.) A court does not direct a litigant how to plead. It may hold that a pleading does not make out a case or a defence, as the case might be, and afford the litigant the opportunity to remedy the position on pain of having its claim dismissed or its defence struck out if it does not do so. But it will only do that in the context of determining an exception. The defendants, rightly or wrongly, had found nothing objectionable in the first third party's pleading of his case and had not noted an exception to it. In the circumstances there was no basis for *an order* to be made giving the third party the opportunity to amend his plea; even less, directing him to do so.

[27] It does not follow, however, that the decision of the court a quo is appealable just because the remedy it provided was misconceived or wrongly formulated. Certainly, it is not made appealable merely because the court granted leave to appeal.[7] Indeed, it was because we had reservations about the susceptibility of the decision at first instance to appeal that counsel were given notice that they should be prepared to argue the question at the hearing. We were subsequently favoured with heads of argument on the point.

[28] The approach that used to be adopted on a fairly rigid basis was that it was only orders that were (i) final in effect and not susceptible to recall or amendment by the court of first instance, (ii) definitive of the rights of the parties, and (iii) dispositive of at least a

[7] See, for example, *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* [2017] ZASCA 134; [2017] 4 All SA 605 (SCA); 2018 (6) SA 440 (SCA) at para. 17, referring to *FirstRand Bank Ltd t/a First National Bank v Makaleng* [2016] ZASCA 169 (24 November 2016) at para 15 and *Cilliers NO & others v Ellis & another* [2017] ZASCA 13 (17 March 2017) (the latter being an example of a case in which the matter was held by the appeal court not to be appealable notwithstanding leave to appeal having been given by the court a quo). Although the paragraph cited is in a minority judgment, there is nothing in the majority judgment that detracts from the point made there. On the contrary, the result of the matter supports it.

substantial portion of the relief claimed in the main proceedings that were susceptible to appeal; see, for example, *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536; and *S v Western Areas Ltd and Others* [2005] ZASCA 31; [2005] 3 All SA 541 (SCA) at para. 20. It has more recently been accepted, however, that the qualifying criteria identified in *Zweni* were not exhaustive or set in stone.[8] 'The interests of justice' have been referred to by the Constitutional Court as the relevant overriding criterion. The Court observed all the same that 'it will often not be in the interests of justice … to entertain appeals against interlocutory rulings which have no final effect on the dispute between the parties'.[9] When regard is had to the approach of the Constitutional Court it has to be borne in mind, however, that appeals to that court are subject to a different regulatory regime.[10] Nevertheless, in *Director-General, Department of Home Affairs and Another v Islam and Others* [2018] ZASCA 48 (28 March 2018) at para. 10, Maya P, dealing with the issue of appealability – in that case of an order granting an interim interdict - remarked that '…whilst the traditional requirements are still important considerations, the court may in appropriate circumstances dispense with one or more of those requirements if to do so would be in the interests of justice, having regard to the court's duty to promote the spirit, purpose and objects of the Constitution e.g. where the interim order "has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable"', an example that would seem to fall within the ambit of a 'compelling reason' in terms of s 17(1)(a)(ii) of the Superior Courts Act.[11]

[29] Cases like *Zweni* were decided with reference to the governing provisions of ss 20 and 21 of the since repealed Supreme Court Act 59 of 1959, whilst regard must now be had instead to ss 16 and 17 of its replacement, the Superior Courts Act. It is relevant to note in that connection that the Supreme Court of Appeal has acknowledged on more than one occasion that the word 'decision' in s 16 of the new Act bears the same meaning that it did in s 21(1) of the Supreme Court Act, with the effect that it has the same import as 'judgment or

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[8] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (A) at 10F; *S v Western Areas* supra, at para. 24.

[9] *Khumalo and others v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771, at paras. 6-8.

[10] As indeed pointed out by O'Regan J in *Khumalo* supra, at para. 6.

[11] The learned President of the Supreme Court of Appeal supported her remarks citing *S v Western Areas* supra; *Moch v Nedtravel* supra; *Philani-Ma-Afrika & others v Mailula & others* [2009] ZASCA 11, [2010] 1 All SA 459 (SCA), 2010 (2) SA 573; *Nova Property Group Holdings v Julius Cobbett* [2016] ZASCA 63, [2016] 3 All SA 32 (SCA), 2016 (4) SA 317; and *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19, 2016 (6) SA 279 (CC), 2016 (9) BCLR 1133.

order' did in s 20(1) of that Act.[12] It seems to me that s 17(1) construed as a whole is a codification of the *Zweni* principles assessed in the context of subsequent gloss afforded in salient decisions such as *Western Areas* and *Philani-Ma-Afrika* supra.[13]

[30] With those principles and considerations in mind I turn now to examine the appealability of the decision of the court a quo.

[31] No order that we might make on appeal could undo the postponement granted by the judge a quo. The position with regard to the postponement order is in any event analogous to that which obtained in *Absa Bank Ltd v Mkhize and Another, and two similar matters* [2013] ZASCA 139; [2014] 1 All SA 1 (SCA); 2014 (5) SA 16 (SCA), in which it was held by the majority that an order postponing the case to enable the carrying out of the court's instructions for its further conduct constituted no more than a direction that had no effect on the determination of the issues in the case, and was therefore not appealable.[14] Moreover, there is nothing about the matter that would make it appropriate for us to entertain an appeal only on the issue of costs.[15]

[32] The focus then must be on that part of the order that acceded to paragraph 2.2 of the defendants' notice of application.[16] In my judgment it is not final in effect, nor is it definitive of the rights of the parties, and it does not dispose of any of the substantive issues in the principal case. It therefore does not comply with any of the attributes for appealability identified in *Zweni*. The appellant's counsel sought in his written argument to argue that the court a quo's interpretation of the pleadings - with which he takes issue - was of final or definitive effect. There is no merit in that contention. The court was not deciding an exception. For the reasons explained earlier, the decision left the pleadings in the state in which it found them. And unless they are subsequently amended, that is the state in which they will remain when the trial commences. Should there be any dispute about their import (which would ordinarily occur in the context of a dispute between the litigants about the relevance or admissibility of evidence that one or other of them might seek to adduce at the

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[12] *FirstRand Bank Ltd t/a First National Bank v Makaleng* supra, at para. 15 *Neotel (Pty) Ltd v Telkom SOC & others* [2017] ZASCA 47 (31 March 2017) at paras. 12-13; and *Cipla Agrimed* supra, at para. 18.

[13] See note 11.

[14] Paragraphs 1 and 2 of the order made by the court of first instance in *Mkhize* (see para. 13 of the minority judgment for the terms of the order in that case) are closely comparable in effect to those made in paragraphs 1 and 2 of the order made in the court a quo in the current matter.

[15] See s 16(2)(a)(ii) of the Superior Courts Act, and cf. *Minister of Rural Development and Land Reform v Phillips* [2017] ZASCA 1, [2017] 2 All SA 33 (SCA) at para. 37.

[16] See paragraph [10] above

hearing), it will be for the trial judge to make a determination, and he or she will in no way be bound in that regard by the court a quo's opinion, or indeed ours.

[33] It remains only to consider whether there is anything about the effect of the order (i.e. 'some other compelling reason') that would nevertheless make it in the interests of justice that an appeal against it should be countenanced. In my view there is not.

[34] I think it is clear, when assessed in the context of relevant principle discussed above and the judge's reasons, that the 'order' granting the remedy sought in terms of paragraph 2.2 of the defendants' notice of application is legally ineffectual and of merely advisory effect, notwithstanding its apparently mandatory tenor. It does not prescribe any consequences should the third party fail to comply with it; and as legal principle acknowledges that an amendment to a party's pleadings can occur only through an act of volition by that party, he could not be held in contempt of court for failing to comply with the direction.[17] A failure to comply with the order would, moreover, not prevent the trial from proceeding. The plaintiff is the *dominus litis*, and it is open to her to apply to the registrar to re-enrol the action for trial. Nothing in the order prevents or prohibits that. To the extent that non-compliance with paragraph 2 of the order made by the court a quo were seen as some sort of obstacle to the trial proceeding, the trial court would be at liberty, by reason of its simple interlocutory character, to recall it; alternatively, to hold on account of its legal ineffectiveness that it might be disregarded.[18]

[35] A rightminded trial judge would have no difficulty in recognising that the order made by the judge a quo could not possibly be properly construed so as to thwart the plaintiff's constitutional right in terms of s 34 of the Bill of Rights to have the action adjudicated. The trial judge would also recognise that the effect of any failure by the first third party to amend his plea to reconcile it with the additional (and apparently alternative) defence adumbrated in paragraph 27 of his trial particulars would be that the trial would proceed on the pleadings as they stand, and that the third party's triable defence(s) would be limited accordingly. Should the third party seek only during the course of the re-enrolled hearing to obtain an amendment

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[17]Cf. *Master of the High Court NGP v Motala N.O*. [2011] ZASCA 238, 2012 (3) 325 (SCA) at paras. 11-15, where it was held that persons cannot be held in contempt of court for failure to comply with a legally ineffectual court order. And see the explanation in *Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd* [2014] ZACC 6, 2014 (3) SA 481 (CC), 2014 (5) BCLR 457 in fn. 78 in para. 103 in regard to the basis for distinguishing the treatment by courts of legally ineffectual decisions by judges from the approach towards administrative decisions in terms of the *Oudekraal* principle (the latter being regarded as effectual until and unless formally set aside).

[18] See *MEC Health, E. Cape v Kirland* cited in note 17 above at the place mentioned.

to his plea of the sort contemplated by the order, and should it then be contended by any other party that it would be prejudicial to allow the amendment at that stage, the judge would no doubt take into account the first third party's failure to avail of the opportunity afforded to him by the court a quo's order in weighing whether the indulgence then sought should be allowed. But that does not render the court a quo's order definitive in any relevant way. In addition, entertaining this appeal would contribute nothing towards the achievement of the just and expeditious determination of the action or the related third party claim.

[36] In the light of all these considerations I do not think it can be suggested with any cogency that the interests of justice require that a challenge to the decision, which satisfies none of the ordinary attributes for appealability, should nevertheless be entertained on appeal. Indeed, when the effect of the judgments in *Motala* and *Kirland* supra, which had been overlooked by counsel, was put to them at the hearing of the appeal it was accepted that the decision by the court a quo was not appealable.

[37] To sum up: the application brought before the court a quo was unnecessary, the resultant order had no substantive effect on the pleaded case, and the endeavour to take it on appeal was misdirected because the decision was not appealable.

[38] The first third party's counsel argued that the appropriate order in the circumstances as to the costs of the appeal should be that each party should bear their own. I do not agree. The first third party prosecuted the appeal in the face of argument by the defendants' counsel in the application for leave to appeal that the decision was not appealable; and he persisted with it notwithstanding having been alerted, many weeks before the hearing, of this court's concern about the appealability of the decision. In the circumstances I consider that the first third party must bear the defendants' costs in the abortive appeal.

[39] An order in the following terms will issue:

> The appeal is struck from the roll with costs, including the costs of the application for leave to appeal.

A.G. BINNS-WARD

Judge of the High Court

L.J. BOZALEK
Judge of the High Court

N.P. BOQWANA
Judge of the High Court

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