REPORTABLE

CASE NO.: SA 26/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SHETU TRADING CC	**APPELLANT**

and

CHAIR, TENDER BOARD OF NAMIBIA	**FIRST RESPONDENT**
MINISTER OF WORKS AND TRANSPORT	**SECOND RESPONDENT**
VAE SA (PTY) LTD	**THIRD RESPONDENT**
PERMANENT SECRETARY, MINISTRY OF WORKS AND TRANSPORT	**FOURTH RESPONDENT**

CORAM:	Maritz JA, Langa AJA *et* O'Regan AJA
Heard on:	15/07/2011
Delivered on:	4/11/2011

APPEAL JUDGMENT

O'REGAN AJA:

[1] The appellant, Shetu Trading CC, was unsuccessful in its tender for a government contract for the provision of railway tracks. In these proceedings, it seeks an interdict preventing the implementation of that tender by the successful party pending review proceedings that the appellant has launched in the High Court. The appellant did not obtain interdictory relief in the High

Court and has approached this Court urgently to appeal against the refusal of relief by the High Court.

[2] The first respondent is the Chairperson of the Tender Board, which was established in terms of section 2(1) of the Tender Board Act, 1996. The Tender Board is responsible for the procurement of goods and services for the Namibian government and invites tenders on the basis of terms and conditions that it stipulates. The second respondent is the Minister of Works and Transport. It is the Ministry of Works and Transport that is responsible for administering the tender that is the subject of these proceedings. The third respondent, cited originally as VAE Perway (Pty) Ltd t/a VAE SA but by order of this Court at the hearing of this matter, with the agreement of all the parties, substituted by VAE SA (Pty) Ltd is the successful tenderer. The fourth respondent is the Permanent Secretary to the Department of Works and Transport.

Facts

[3] On 29 June 2010, the Tender Board advertised tender number F/1/10/1-22/2010, Northern Railway Extension Project: Rail Procurement (the tender) which called for the provision of rails required for the extension of a railway line from Ondangwa to Oshikango in northern Namibia. The tender closed on 4 August 2010. Six tenders were received, one of them from the appellant, and one from the third respondent.

[4] It is common cause that the tender had been awarded to the third respondent, VAE SA, by early September 2010. The appellant was not formally told that it had not been awarded the tender, but learnt of the award informally shortly afterwards. Upon learning that the tender had been awarded to someone else, Ms Anna Mbundu, the Executive Director of the appellant and the deponent to the founding affidavit, wrote to the Minister of Finance as well as the first, second and fourth respondents on 6 September 2010 adverting to alleged flaws in the tender process and requesting that the tender be set aside pending the appointment of an independent Ministerial Tender Committee. Having received no substantive response from the addressees, she wrote again on 15 September to the first respondent, as well as to the Minister and Deputy Minister of Finance. Again, she alleged flaws in the tender process and requested that the Tender Board reconsider its award.

[5] On 28 September 2010 and 4 October 2010, the Tender Board wrote to the appellant in response to her letters of 6 and 15 September respectively. Not satisfied with the responses, Ms Mbundu wrote again to the Minister of Finance and the first respondent on 29 October at length alleging flaws in the award of the tender. On 4 November, the Tender Board replied to her letter of 29 October stating that the Attorney-General in legal advice to the Tender Board and the Minster of Finance had found the appellant's complaints to be without merit, and asserting that the appellant's tender had been correctly disqualified from the tender process.

[6] On 12 November 2010, the appellant's attorneys wrote to the first and fourth respondents informing them that they had received instructions to bring review proceedings to set aside the decision of the Tender Board to award the tender to the third respondent. In that letter, the attorneys made the following request:

> "We are instructed that the agreement to conduct the tender has not yet been signed, and we hereby request your undertaking not to sign such agreement, pending the filing of our papers early next week."

[7] It should be emphasized here, that the undertaking requested by the appellant's attorneys in their letter of 12 November is unmistakably an undertaking not to sign the tender agreement pending the filing of the review application and not any later date. The appellant launched review proceedings in the Windhoek High Court on 22 November 2010. In the notice of motion instituting the review proceedings, the appellant did not seek an interdict preventing the respondents from entering into the tender contract or from implementing the award of the tender pending the outcome of the review proceedings. The contract between the third respondent and the Department of Works and Transport was entered into a few days later on 26 November 2010.

[8] Four months after the institution of the review proceedings, the appellant's attorneys once again wrote to the government attorney who was representing the second and fourth respondents in the review proceedings,

noting that the appellant had learnt that the parties had now signed the tender contract. The letter then continued:

> "In view of the pending review proceedings, we are instructed to request an undertaking by the second and third respondents that no further steps or actions shall be taken by them to implement the alleged signed agreement. Should we not receive such an undertaking by 12h00 noon, Tuesday 29 March 2011, that no further steps or actions shall be taken by either second and third respondents to implement the agreement, we shall approach Court for an urgent interim interdict, pending the outcome of the review proceedings."

[9] Again, it should be noted here that at no time prior to this letter of 12 March had the appellant's attorneys actually requested an undertaking from the respondents not to implement the tender agreement *pending the outcome of the review proceedings.* The first time that the appellant's attorneys sought an undertaking that the implementation of the tender should not proceed was in March 2011, more than six months after the appellant came to know that the tender had been awarded.

Proceedings in the High Court

[10] As no undertaking was forthcoming from the respondents and after a local newspaper had reported on 31 March 2011 that the first consignment of the rails in terms of the tender agreement had arrived in Walvis Bay, the appellant instituted these proceedings on an urgent basis on 1 April 2011 seeking relief in the following terms:

> "Interdicting the second, third respondent and fourth respondents from taking any further steps, including taking delivery of the rails and other stock or equipment, in furtherance of the award of tender no: F/1/10/1-22/2010 Northern Railway Extension Project: Rail Procurement (the tender) to third respondent pending the finalisation of the application launched on 22 November 2010, reviewing the purported decision by the Tender Board of Namibia to award the tender to third respondent."

[11] The application was heard as a matter of urgency on 6 April and on 7 April 2011, Ndauendapo J dismissed the application for an interim interdict with costs. On 15 April 2011, the High Court granted leave to appeal against that decision and the appeal was noted in this Court on that date. The appeal was then set down for hearing on 15 July 2011. When leave to appeal was granted and the appeal was noted, Ndauendapo J had not yet furnished reasons for his decision. Those reasons were lodged in this Court on 7 July, a week before the appeal hearing.

[12] Before the appeal hearing in this Court and before the reasons for the order made by Ndauendapo J had become available, the appellant once again launched urgent proceedings in the High Court for an interim interdict. The second application was heard by Heathcote AJ on 14 June 2011, and the application was dismissed with reasons on 22 June 2011. Those reasons were annexed to the first, second and fourth respondents' heads of argument in this appeal. The appellant has not sought leave to appeal against the judgment of Heathcote AJ in dismissing the application for an interim interdict.

[13] The events that took place in the High Court after the appeal had been enrolled in this Court raise some novel and difficult questions for this Court to consider. Accordingly, on 12 July 2011, this Court directed the Registrar to write to the parties requesting them to be prepared to answer questions from the Bench at the hearing of the appeal on 15 July. Those questions were the following:

> "Given the reasons of the Court *a quo* for the order appealed against (lodged on 7 July 2011) and the judgment of the High Court dated 22 June 2011 (attached to the 1st, 2nd and 4th respondents' heads of argument), counsel must be informed that the Court will also invite argument at the hearing on the following questions:
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> (i) Is the High Court's refusal to grant leave that an application for interim interdictory relief be heard on an urgent basis as envisaged in sub-rules (12) and (13) of rule 6 of the High Court Rules appealable to the Supreme Court and, if so –
> (aa) under which circumstances;
> (bb) are those circumstances applicable to the appeal under consideration;
> (cc) do the circumstances referred to in (aa) include an instance where, pending the appeal but before the hearing thereof, an urgent application (by the same applicant) for the same relief (against the same respondents) was brought in and adjudicated by the High Court on an urgent basis?
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> (ii) In the event that the Court may find that the High Court's refusal referred to in paragraph (i) is appealable, may (and, if so, should) the Court proceed to decide the merits of the application on appeal in circumstances where, pending the appeal in the Supreme Court, the merits have already been decided by the High Court against the appellant and that order of the High Court has not been appealed against or is not the subject matter of the appeal currently before the Court?"

Issues

[14] The following issues thus arise for consideration:

(a) Is the order made by Ndauendapo J dismissing the application for an interim interdict appealable to this Court?

(b) Does the fact that the High Court has dismissed a second application for identical relief by the appellant subsequent to the noting of the appeal in this Court affect the answer to the question posed in (a)?

(c) In the event that the Court decides that the order made by Ndauendapo J is appealable, should the appeal succeed?

Appeals against the dismissal of urgent interlocutory relief

[15] It is clear from the reasons provided by Ndauendapo J that he dismissed the application on the grounds that Shetu Trading CC had not established that the matter was urgent within the terms of rule 6(12)(b). He did not traverse the merits of the application at all. Ordinarily, where a judge decides that the applicant in an urgent application has not established that the matter is so urgent that it justifies the extend of condonation for non-compliance with the prescribed times and forms sought as contemplated by rule 6(12), the judge will strike the matter from the roll.[1] The applicant will then have several possible options. It may approach the Court again for the same relief if circumstances change so that it can establish the requisite urgency or it may approach the Court seeking the same relief but with greater compliance

[1]See, for South African authority, *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership* 2006 (4) SA 292 (SCA) at para 9; *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 139F – 140A .

with the rules or it may choose to re-launch the application for substantive relief in the ordinary course. In this case, the Judge dismissed the application with costs and then, upon application, granted leave to appeal against the order he had granted.

[16] The parties only became aware of the basis for the dismissal of the application when the reasons became available on 7 July 2011. The question that now arises is whether the order made by Ndauendapo J is appealable or not.

[17] Section 14(1) of the Supreme Court Act, 15 of 1990 provides that the Supreme Court has the jurisdiction to hear and determine appeals from "any judgment or order of the High Court".[2] Subsections 18(1) and (3) of the High Court Act, 16 of 1990 are also relevant and provide that –

> "(1) An appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal shall, except insofar as this section otherwise provides, be heard by the Supreme Court.
> (2) …
> (3) No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court."

[2] Section 14(1) provides as follows: "The Supreme Court shall, subject to the provisions of this Act or any other law, have jurisdiction to hear and determine any appeal from any judgment or order of the High Court and any party to any such proceedings before the High Court shall if he or she is dissatisfied with any such judgment or order, have a right of appeal to the Supreme Court."

[18] This Court has considered the appealability of judgments or orders of the High Court on several occasions.[3] In *Vaatz v Klotsch and Others,*[4] this Court referred with approval to the meaning of "judgment or order" in the equivalent provision in the South African High Court Rules given by Erasmus in *Superior Court Practice.* Relying on the jurisprudence of the South African Supreme Court of Appeal, Erasmus concluded that an appealable "judgment or order" has three attributes: it must be final in effect and not susceptible to alteration by the Court of first instance; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[5]

[19] This summary is drawn directly from the judgment of *Zweni v Minister of Law and Order.*[6] In that case, the South African Appellate Division referred to the distinction between "judgments and orders" that are appealable and "rulings" that are not.[7] According to the Court in *Zweni*, the first characteristic of a ruling, as opposed to a judgment or order, is that it lacks finality. As Harms AJA formulated the test: "unless a decision is *res judicata* between the parties and the Court of first instance is thus not entitled to reconsider it, it is a ruling."[8] He continued –

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[3] See, for example, *Vaatz and Another v Klotzsch and Others*, unreported judgment of this Court SA 26/2001, dated 11 October 2002; *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC); *Wirtz v Orford and Another* 2005 NR 175 (SC); *Handl v Handl* 2008 (2) NR 489 (SC); *Minister of Mines and Energy and Another v Black Range Mining (Pty) Ltd*, unreported judgment of this Court SA 18/2009, dated 15 July 2010; *Knouwds NO v Josea and Another* SA 5/2008, unreported judgment of this Court, dated 14 September 2010; *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others*, unreported judgment of this Court, SA 25/2008 dated 19 May 2011.

[4] Id.

[5] See Erasmus *Superior Court Practice* (Juta) A1-43.

[6] 1993 (1) SA 523 (A) at 531 I – 533B.

[7] This is a distinction with a long pedigree in South African jurisprudence. See *Dickinson and Another v Fisher's Executors* 1914 AD 424 at 427 – 8.

[8] Id at p 535 G.

> "In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking 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."[9]

[20] There are important reasons for preventing appeals on rulings. In *Knouwds NO v Josea and Another,*[10] this Court cited with approval the following remarks of the South African Supreme Court of Appeal in *Guardian National Insurance Co Ltd v Searle NO,*[11]

> "There are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirably for obvious reasons, that such issues be resolved by the same Court and at one and the same time."[12]

[21] As the court in *Guardian National Insurance* went on to note, one of the risks of permitting appeals on orders that are not final in effect, is that it could result in two appeals on the same issue which would be "squarely in conflict" with the need to avoid piecemeal appeals.[13]

[22] Nevertheless, the South African Supreme Court of Appeal has recognized that the question of appealability is "intrinsically difficult",[14] a

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[9] Id at 536 B.
[10] SA 5/2008, as yet unreported judgment of this Court dated 14 September 2010, at para 13.
[11] 1999 (3) SA 296 (SCA).
[12] Id at 301 B.
[13] Id at 302 B.
[14] *Cronshaw and Another v Fidelity Guard Holdings (Pty) Ltd* 1996 (3) SA 686 (A) at 690D.

"vexed issue"[15] and that the principles set out in *Zweni* are not "cast in stone"[16] but are "illustrative, not immutable".[17] There are thus times where the court has held a "judgment or order" to be appealable when one of the attributes stipulated in *Zweni* is missing[18] and even that a judgment or order is unappealable, despite all three attributes being present, when hearing the particular appeal would render the issues in a case being considered piecemeal.[19] The principles in *Zweni* are therefore useful guidelines, but not rigid principles to be applied invariably.

[23] In citing Erasmus' approach with approval in the *Vaatz* case, this Court noted a difference between the South African High Court Rules and the High Court Act that must be borne in mind. Section 18(1) of the High Court Act provides for a right to appeal against "judgments or orders" of the High Court made in civil proceedings as a court of first instance to this Court without leave. Section 18(3) is an exception. It provides that no appeal will lie against a judgment or order that is "an interlocutory order or an order as to costs only left by law to the discretion of the court", except with the leave of the court against whose judgment or order is to be made, or where such leave is refused with the leave of the Supreme Court. The South African Supreme Court Act, 59 of 1959, by contrast, provides that in all civil cases,[20] leave to appeal against a "judgment or order" must be obtained either from the court

[15] *Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) at para 14.

[16] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F and see discussion below at [29].

[17] *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at 453A.

[18] See, for example, *Moch's* case, cited above n 16, and discussed below at [27].

[19] See *Health Professions Council*, cited above n 15 at para 16.

[20] Civil appeals to the Constitutional Court in South Africa are governed by different provisions that do not concern us here.

against whose judgment is to be made, or from the Supreme Court of Appeal.[21]

[24] The fact that leave to appeal is granted by a lower court does not put an end to the issue whether a judgment or order is appealable. The question of appealability, if an issue in the appeal, remains a question for the appellate Court to determine. If it decides that, despite the fact that leave to appeal has been granted by the lower court, the judgment or order is not appealable, the appeal will still be struck from the roll.[22]

[25] In *Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another* 2005 NR 21 (SC), this Court was concerned with the question of appealability of an order refusing an application for urgent mandatory relief, on the basis that the applicant had not established urgency. The Court repeated with approval the three attributes of appealability identified by Erasmus in *Superior Court Practice.*[23] On the question of urgency, Strydom CJ on behalf of a unanimous Court reasoned as follows:

> "A dismissal of an application on the grounds of lack of urgency cannot close the doors of the Court to a litigant. A litigant is entitled to bring his case before the Court and to have it adjudicated by a judge. If the arguments … are taken to their full consequence, it would mean that, at this preliminary stage of the proceedings, a Court would be able to effectively close its doors to a litigant and leave the latter with only a possibility to appeal. To do so would not only incur unnecessary costs but would, in my opinion, also be in

[21] See section 20(4)(a) and (b) of the Supreme Court Act, 59 of 1959.

[22] See *Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd*, cited above n 14, at 689 B – D; *Guardian National Insurance Co Ltd v Searle NO* 1999 (3) SA 296 (SCA) at 300 – 301; *Health Professions Council of South Africa*, above n 15, at para 27.

[23] At 29 B - C.

> conflict with article 12(1)(a) of the Constitution, which guarantees to all persons, in the determination of their civil rights and obligations, the right to a fair and public hearing before a Court established by law."

[26] The thrust of this reasoning was thus that ordinarily the dismissal of an application on the grounds of urgency is not appealable, because it is not final in effect, in that it does not "close the doors of the Court" to the applicant. Strydom CJ qualified this approach slightly in the following lines –

> "I want to make it clear, however, that there may be instances where the finding of a Court that a matter was not urgent, might have a final or definitive bearing on a right which an applicant wanted to protect and where redress at a later stage might not afford such protection. See *Moch's* case (*supra*) at 10 F – G.[24] In such an instance no leave to appeal would be necessary. However, the present case is not such an instance …. A refusal to hear a matter on the basis of urgency may, in the Namibian context, be regarded as what was termed a 'simple interlocutory order' for which leave to appeal would be necessary in terms of section 18(3) of the Act of 1990."[25] (Footnote inserted)

[27] *Moch's* case was not concerned with an appeal relating to urgency but concerned the refusal of a recusal application in provisional sequestration proceedings. Although an appeal against the grant of an order of provisional sequestration was expressly excluded under the South African statute,[26] the court held that the dismissal of the recusal application was appealable. The Court observed that if an application for recusal is wrongly refused, the subsequent proceedings are invalid. Following on this, the Court reasoned:

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[24] 1996 (3) SA 1 (A).
[25] At 33 A – D.
[26] Section 150 of the Insolvency Act, 24 of 1936, as amended.

> "Accepting then as we must that, if Fine AJ ought to have recused himself, his refusal to do so had a pervasive vitiating effect upon all the proceedings and every order granted at both stages thereof, the question is whether his refusal qualifies for appealability. In my judgment it does."[27]

[28] The Appellate Division of the South African Supreme Court thus accepted that although the refusal of an application for recusal is "not definitive of the rights about which the parties are contending",[28] it had "a very definitive bearing" on the determination of the parties' rights.[29]

[29] What is clear from this Court's approach in *Aussenkehr* is that the dismissal of an urgent application for want of urgency will normally not be appealable because the effect of such an order is not definitive of the rights of the parties. It also suggests that there may be rare cases where the effect of the dismissal of an urgent application is definitive of rights. In such a case, if one ever arises, the Court, *obiter,* indicated that an appeal might lie. But in some contrast to this reasoning, the final sentence quoted from the judgment in *Aussenkehr* suggests that an appeal may lie against a decision on urgency with leave. This sentence is clearly *obiter* in its context and I return to it at para [36] below.

[30] Very recently, in *Namib Plains Farming and Tourism cc v Valencia Uranium (Pty) Ltd and Others,*[30] this Court was concerned with an appeal against a judgment of the High Court, in which the respondent lodged a

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[27] 1996 (3) SA 1 (A) at 10B.
[28] Id at 10E.
[29] Id at 10 F – G.
[30] SA 25/2008; as yet unreported judgment of this Court dated 19 May 2011.

conditional counter appeal, on the basis that the High Court should have struck the application for interim relief from the roll with costs on the grounds that the applicant had failed to disclose material evidence to establish urgency. This conditional counter appeal was dismissed by the Court on the ground that "[u]rgency is not an appealable issue in any circumstance."[31] Shivute CJ referred to the *Ausssenkehr* decision and continued:

> "whether urgency exists in a particular case is a factual question which is determined on a case by case and discretionary basis. There are no public interests to be served for this Court to be seized with the determination of issues of urgency which are dealt with by the High Court on a regular basis and on which there are a plethora of authorities to guide that Court …".[32]

[31] The *dictum* in *Valencia Uranium* suggests that decisions on urgency are never appealable whereas one of the dicta in *Aussenkehr* suggests that decisions on urgency will ordinarily not be appealable but leaves open the possibility that there may be rare examples where the decision on urgency is appealable because it may have a final or definitive effect on the rights of the parties. These apparently differing approaches are not as different as might initially appear, once one considers the different contexts of the two appeals. The conditional counter-appeal in *Valencia Uranium* was against the *grant* of a prayer for condonation on the grounds of urgency whereas, in *Aussenkehr's* case, the appeal was against an order where the Court had *refused* to grant condonation and so had struck the application from the roll for lack of urgency – the subject matter of the one appeal was thus the exact converse of the other. The principle underlying the *dictum* in *Valencia Uranium* is that it may

[31] Id at para [41].
[32] Id.

well frustrate the objective of urgent applications if orders condoning non-compliance with the rules on the basis of urgency would be appealable in themselves. The principle underlying *Aussenkehr* is that substantial injustice may result if there is an absolute bar to appeals against orders refusing condonation for non-compliance on the grounds of urgency, no matter how final or definitive the effect of such findings may be on the substantive rights of the parties. It is not necessary in this case to endorse the principle in *Aussenkehr* that there may be circumstances where an appeal will lie against an order refusing condonation for non-compliance on grounds of urgency. Such endorsement will only need to be considered when a case arises in which substantial injustice may result from the rule barring appeals on urgency.

[32] This is not such a case. The finding of the Court *a quo* on urgency in the present case was neither final nor definitive of the appellant's rights. Indeed the events following the dismissal of the first interdict application illustrate the fact that a decision on urgency does not "close the doors" of the Court to a litigant. Once the High Court had dismissed the first urgent interlocutory application for interdictory relief (the application that is the foundation of this appeal), the appellant applied and was granted leave to appeal against that order. Thereafter, before the appeal was heard, the appellant launched a second urgent interlocutory application for the same relief.

[33] The second application came before a different Judge, Heathcote AJ, who did not have the benefit of the reasons of the Judge in the first application, Ndauendapo J. All Heathcote AJ had was the order made by Ndauendapo J dismissing the application with costs. Heathcote AJ took the view that the first application had not been dismissed on the merits, but had failed because the applicant had not established urgency. He inferred this from the fact that Ndauendapo J had not granted the applicant leave to proceed on the basis of urgency. As a result of this inference, Heathcote AJ rejected an argument that the matter was *res judicata.* He held that as the merits had not been addressed by Ndauendapo J, it was open to the appellant to approach the Court again and seek to establish urgency if the facts had changed. Heathcote AJ accepted that on the facts set out in the second application, urgency had been established so he granted the appellant leave to proceed by way of urgency. However, upon an examination of the merits, Heathcote AJ concluded that the balance of convenience did not favour the appellant, and so dismissed the application. The appellant has not appealed against that order. I do not comment on the correctness or otherwise of Heathcote AJ's conclusions on urgency and the merits of the application, issues which are not before us. Given the facts summarized especially at paragraphs 8 – 9 above, this judgment should not be understood as an endorsement of his findings on urgency.

[34] What is clear now that we have the benefit of the reasons of Ndauendapo J, is that he did indeed not decide the merits but concluded that the applicant had failed to establish urgency. In such circumstances, a judge

will ordinarily not dismiss the application, but will strike it from the roll. The reason for this is that the first prayer in a notice of motion where an applicant seeks to proceed by way of urgency is a prayer that the Court condone the non-compliance with the Rules of Court and permit the applicant to proceed by way of urgency. If a court concludes that an applicant has not made out a case to proceed by way of urgency, that prayer is not granted and the rest of the application is not considered at all. The effect, therefore, is that the application is improperly before the Court because the rules have not been complied with, and the Court will therefore strike the application from the roll. When a matter is struck from the roll in this fashion, it is clear that there has been no ruling on the merits at all. As Cameron JA helpfully explained in a recent judgment of the South African Supreme Court of Appeal:

> "Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and it is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the Rules of Court permit a Court (or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This, in effect, permits and urgent applicant, subject to the Court's control, to forge its own Rules (which must 'as far as practicable be in accordance with' the Rules). Where the application lacks the requisite element or degree of urgency, the Court can, for that reason, decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the Court's roll and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance." (footnotes omitted) [33]

[33] See *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership and Others,* cited above n 1, at para 9.

[35] An adverse decision on the application to proceed urgently does not "close the doors" of the High Court to the litigant. A litigant may re-approach the High Court for the same relief, if he or she can establish that the relief is urgent. A decision by the High Court on urgency alone is thus not ordinarily appealable to this Court because it normally lacks the element of finality which would render it a "judgment or order" within the meaning of section 18(1) of the High Court Act.

[36] The next question that arises is whether the fact that the High Court granted leave to appeal against the order renders the order appealable. This question brings us back to the second *dictum* in *Aussenkehr* contained in the last sentence of the paragraph of the judgment cited at para [26] above, where the Court mentioned that a decision on urgency might be regarded as an 'interlocutory order" within the meaning of section 18(3) and, therefore, appealable with leave.

[37] In order to consider this issue, it is necessary to look at the language of section 18 of the High Court Act more carefully. Section 18(1) provides that an appeal from a "judgment or order" of the High Court lies to the Supreme Court. Section 18(3) then provides that a "judgment or order" where the order is interlocutory or concerned with an order of costs alone is not appealable without leave. Given that section 18(3) repeats the words "judgment or order" which are used in section 18(1) as well, it seems plain that section 18(3) does not expand the scope of "judgments or orders" against which an appeal will

lie; it merely provides that in the cases of certain "judgments or orders", an appeal will only lie with leave.

[38] If the High Court grants leave to appeal against a decision that does not constitute a "judgment or order" within the meaning of section 18(1), the Supreme Court is not bound to decide the appeal. The Court must always first consider whether the decision is appealable. If the decision against which leave to appeal has been granted does not fall within the class of "judgments or orders" contemplated by section 18(1), then it is not appealable at all.

[39] Not every decision made by the Court in the course of judicial proceedings constitutes a "judgment or order" within the meaning of section 18(1).[34] As Corbett JA explained in *Van Streepen and Germs v Transvaal Provincial Administration*,

> "But not every decision made by the Court in the course of judicial proceedings constitutes a judgment or order. Some may amount merely to what is termed a 'ruling', against which there is no appeal."

[40] In South African law, the distinction between "judgments and orders" on the one hand and "rulings" on the other, as has been mentioned above, stems from the early judgment of the Appellate Division in *Dickinson and Another v Fisher's Executors*[35] where Innes ACJ reasoned:

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[34] This was expressly contemplated in *Vaatz's* case, cited above n3, at p 14. In the South African context, see *Van Streepen and Germs v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 580E; see also *Dickinson and Another v Fisher's Executors* 1914 AD 424 at 427 – 8 where Innes ACJ reasoned: "But every decision or ruling of a Court during the progress of a suit does not amount to an order. That term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, …, or it may be of great importance, …, but the Court must be duly asked to grant some definite and distinct relief, before its decision upon the matter can properly be called an order." (At 427)

[35] 1914 AD 424.

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[41] There will be many occasions, where a ruling by the High Court will not constitute a judgment or order that is appealable within the meaning of section 18(1). Such a ruling may not be converted into an appealable "judgment or order" simply by the grant of leave to appeal. The distinction between an "interlocutory order" that is appealable with leave in terms of section 18(3) and a ruling which is not appealable because although interlocutory, it lacks the quality of being a judgment or order, will often be difficult to draw for the reasons that appealability itself is challenging as observed above.[36]

[42] The question in this case is whether the order made by Ndauendapo J, framed as it was, as an order "dismissing the application with costs", is an order subject to appeal. Upon a reading of the reasons given by Ndauendapo J, it is clear that whatever the form and words of the order, the Judge had concluded that the appellant had not made out a case for urgency as required by rule 6(12)(b). Accordingly, good practice would have resulted in the Court's striking the application from the roll. Such an order would not have prevented the appellant from re-enrolling the application with or without supplemented evidence, either with greater compliance with the Rules of Court or in the

[36] See para [22] above.

ordinary course, whichever course the appellant considered appropriate. Given that the doors of the Court would not have been closed to the appellant, and given that we have concluded that no rights of the applicant would have been finally determined by the order, no appeal could have been brought against such an order. In the circumstances, the *obiter* suggestion in *Aussenkehr*, that a decision on urgency could be appealed with leave under section 18(3), cannot be accepted without qualification. Only "judgments or orders" may be appealed, whether without leave under section 18(1) or with leave under section 18(3). The order by Ndauendapo J did not close the doors of the High Court to the appellant, nor did it definitely determine his rights. It thus lacked the element of finality necessary to constitute a "judgment or order" and is therefore not appealable, even with leave.

[43] Does the fact that the Judge formulated the order as one "dismissing the application" change this? In my view, it does not. The only issue determined by the High Court Judge was the issue of urgency. The merits of the dispute were not considered. The High Court was not precluded from reconsidering the matter, as subsequent events illustrated. The order of Ndauendapo J was therefore not a "judgment or order" within the contemplation of section 18 of the High Court Act. I note in passing that it would advance the cause of clarity if High Court Judges, upon deciding that urgency has not been established and so do not proceed to consider the merits of application, were to strike such applications from the roll, rather than issuing orders that the application has been "dismissed". Parties will then understand that the merits have not been traversed, and that the applicant is

not prevented from re-approaching the High Court. An order striking a matter off the roll for want of urgency will then in the vast majority of cases not be appealable. The only remaining question, which does not arise finally for decision here, is whether a decision on urgency will be appealable if an appellant can establish that the effect of the refusal of a prayer for condonation on the basis of urgency, is such as to have "a final or definitive bearing on a right".[37] As in this case, we have held that the order made by Ndauendapo J did not have a final bearing on appellant's rights, that question does not arise for decision.

[44] In the circumstances, I conclude that the order made by Ndauendapo J, based as it was on a conclusion that the appellant had not established urgency as required by rule 6(12)(b) was not appealable even with leave, as it did not constitute a "judgment or order" within the contemplation of section 18 of the High Court Act. In the circumstances, the appeal in this matter was not properly enrolled and it, too, should be struck from the roll with costs.

Does the decision by Heathcote AJ in the second interlocutory application affect this conclusion?

[45] As will have become plain from the reasoning set out above, the decision by Heathcote AJ in the second interlocutory application has no effect on the conclusion reached above. No more need be said about it. In the light of the conclusion I have reached, the third question, set out at paragraph [16] above, does not arise for decision.

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[37] See *Aussenkehr*, cited above n 3, at p 33.

Costs

[46] Given that the first, second and fourth respondents, on the one hand, and the third respondent were compelled to oppose the appeal, and given that the appellant has not succeeded, it is appropriate to order that the appellant pay the costs of the opposition.

[47] In the premises, the following order is made:

1. The appeal is struck from the roll.
2. The appellant is ordered to pay the legal costs of the first, second and fourth respondents who were jointly represented, and the third respondent, such costs to include, in both cases, the costs occasioned by the employment of one instructed and one instructing counsel.

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O'REGAN, AJA

I agree

_____
MARITZ, JA

I agree

_____
LANGA, AJA

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