THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 20729/2014

In the matter between:

GARY ITZIKOWITZ **APPELLANT**

and

ABSA BANK LIMITED **RESPONDENT**

Neutral citation: *Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 (31 March 2016)

Bench: Ponnan, Cachalia, Willis and Saldulker JJA and Fourie AJA

Heard: 15 March 2016

Delivered: 31 March 2016

Summary: Delict – pure economic loss – shareholder suing for diminution in the value of his shareholding – wrong committed against company, not shareholder – shareholder not entitled to recover loss.

ORDER

On appeal from: Gauteng Local Division High of the Court, Johannesburg (Swartz AJ sitting as court of first instance):

> Save for affording the appellant 15 days to deliver a notice to amend counterclaim A, if so advised, the appeal is dismissed and the cross-appeal is struck from the roll in each instance with costs.

JUDGMENT

Ponnan JA (Cachalia, Willis and Saldulker JJA and Fourie AJA):

[1] This appeal and cross-appeal arise from exceptions taken by the respondent, Absa Bank Limited (Absa) to two counterclaims by the appellant, Mr Gary Itzikowitz. The appellant is the sole shareholder of Compass Projects (Pty) Ltd (Compass). Compass, in turn, holds 17.29 per cent of the shares in a public company, Quantum Properties Group Limited (QPG). QPG held 100 per cent of the shares in A Million UP (Pty) Ltd (AMU), a property development company. Compass has a loan account in AMU from which it is owed R5 292 442. Absa was the banker to AMU and QPG and had extended loan facilities to AMU. After June 2010, Absa increased the loan facilities to AMU from R390 million to over R500 million. According to Absa, as at 31 August 2011, it was owed a total of R569 318 000 by AMU.

[2] On 4 June 2012 the board of directors of AMU resolved that it voluntarily commence business rescue. On 18 June 2012, and at the instance of Absa, the

Western Cape High Court, Cape Town (the WCHC) issued an order setting aside the resolution of the board of AMU. On 29 June 2012 Absa applied to the WCHC for an order that AMU be placed under provisional winding-up. It alleged that AMU was hopelessly insolvent and unable to pay its debts. The provisional order was confirmed and made final by the WCHC on 14 August 2012.

[3] On 30 August 2012 Absa caused a summons to be issued out of the South Gauteng High Court, Johannesburg (the SGHC) against the appellant for payment of the sum of R20 million together with interest and costs on the attorney and own client scale. Absa relied for its cause of action on a suretyship signed by the appellant on 9 January 2008 in terms of which he bound himself 'as a surety and co-principal debtor jointly and severally together with' AMU in favour of Absa. The suretyship was 'Limited to a maximum of R20 million together with such further amounts in respect of interest and costs as have already accrued or which will accrue until date of payment of the amount'. In response, the appellant filed a plea and two counterclaims – the subject of this appeal.

[4] In support of his counterclaims the appellant alleged that AMU's demise was a result of intentional, reckless or negligent conduct by Absa in: (a) advancing funds to AMU when there was no reasonable prospect of the monies being repaid; (b) colluding with directors of QPG and AMU, and the auditors of AMU, to ensure that they advanced Absa's wishes to the detriment of AMU; (c) colluding with AMU's joint venture partner, Protea Hotels, in order to secure benefits for it at the expense of AMU; (d) ignoring the appellant's written request in September 2011 to cease advancing funds to AMU; and (e) setting aside the attempted business rescue and then applying for AMU's winding-up. As a result of AMU being wound up, so the allegation goes: (a) the value of QPG's shareholding in AMU had reduced to nil; (b) trading in QPG shares was suspended by the Johannesburg Stock Exchange; (c) the value of Compass' shareholding in QPG was reduced to nil; and (d) Compass' loan amount in AMU amounting to R5 292 442 was rendered irrecoverable. By way of his counterclaims the appellant seeks to recover

from Absa the amount of the reduction in value of his shareholding in Compass, alleged to be R50 002 338.

[5] The appellant's counterclaim A is founded in delict. The key allegations on which he relies are that: (a) Absa knew that he was a surety, who had a financial interest as an indirect shareholder in QPG and AMU; and (b) Absa knew (or more accurately foresaw) that a winding-up of AMU would materially impact upon the value of the QPG shares in AMU, the value of Compass shares in QPG and, correspondingly, the value of his shares in Compass. The 'legal duty' for his asserted delictual claim is framed thus:

'In the premises the plaintiff [Absa] owed the defendant [Mr Itzikowitz] a legal duty to conduct itself towards AMU as a reasonable banker and not to take any decisions or to engage in any business conduct which could adversely affect the value of shares in AMU or the value of any loan account in AMU in material respects. The said legal duty arose directly as a result of the banker-customer relationship between the plaintiff and QPG and between the plaintiff and AMU.'

[6] In counterclaim B, which was pleaded in the alternative, the appellant relies on the same allegations of misconduct by Absa as in counterclaim A. However, here he relies on the provisions of s 218(2)[1] read with s 22(1)[2] of the Companies Act 71 of 2008. He alleges that the devaluation of his shares in Compass qualifies as 'any loss or damage' contemplated by s 218(2) and that Absa's conduct constitutes a breach of s 22(1). This, so the allegation goes, permits him to recover the devaluation directly from Absa.

[7] The SGHC (per Swart AJ) held:

'I am satisfied that claim A does not disclose a cause of action against the plaintiff and is bad in law as the legal duty relied upon is non-existent. The defendant's claim A in reconvention is struck out. Claim B in reconvention falls within the ambit of s 218(2) read with s 22(1) of the

[1] Section 218(2) reads: 'Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.'

[2] Section 22(1) reads: 'A company must not carry on its business recklessly, with gross negligence, with intend to defraud any person or for any fraudulent purpose.'

Companies Act and is valid. Claim B in reconvention is allowed to proceed to trial in order for the averments made in the claim to be proved.'

It accordingly issued the following order:

'1. The exception on claim A is upheld.

2. Claim B in reconvention is allowed to proceed to trial.

3. Each party is ordered to pay its own costs.'

The appellant appeals against the order upholding Absa's exception, whilst Absa cross-appeals the dismissal of its exception in relation to the appellant's counterclaim B.

[8] Counterclaim A is a delictual claim for pure economic loss. It is well-established that in contrast to cases of physical harm, conduct causing pure economic loss is not prima facie wrongful.[3] As it was recently put by the Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC) para 23:

'So our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must be positively established. It has thus far been established in limited categories of cases, like intentional interferences in contractual relations or negligent misstatements, where the plaintiff can show a right or legally recognised interest that the defendant infringed.' (Footnotes omitted.)

Indeed, as the Constitutional Court pertinently pointed out in *Country Cloud* (para 43): 'Until we are satisfied the department *wronged* Country Cloud, its claim does not get off the ground'.[4]

[9] Absa's primary contention is, in principle, very simple: It is that damage, if suffered at all, had been suffered by AMU and that the appellant, being no more than in the position of a shareholder thrice removed from that company, could not sue to recover its (AMU's) loss or in the language of *Country Cloud*, that the appellant had not been 'wronged' by Absa. In approaching this enquiry it is important to keep certain fundamental principles of company law in mind.[5] The notion of a company as a distinct

[3] *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2005] ZASCA 120; 2006 (3) SA 151 (SCA) para 1.

[4] See also *Minister for Safety and Security v Scott & another* [2014] ZASCA 84; 2014 (6) SA 1 (SCA).

[5] These principles are usefully discussed in 4(1) *Lawsa* 2 ed (2012) paras 65-70 and 76.

legal personality is no mere technicality – a company is an entity separate and distinct from its members and property vested in a company is not and cannot be, regarded as vested in all or any of its members.[6] Generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity.[7] A company's property belongs to the company and not its shareholders. A shareholder's general right of participation in the assets of the company is deferred until winding-up, and then only subject to the claims of creditors.[8] In *Gohlke and Schneider v Westies Minerale (Edms) Bpk* 1970 (2) SA 685 (A) at 692E-G, Trollip JA observed:

'The company and its members are bound only to the same extent *as if* the articles had been signed by each member, that is, as if they have contracted in terms of the articles. The articles, therefore, merely have the same force as a contract between the company and each and every member as such to observe their provisions . . .'

[10] Of particular relevance to the present enquiry is the following statement in *Lawsa*:

'Since the shareholder's shares are merely the right to participate in the company on the terms of the memorandum of incorporation, which right remains unaffected by a wrong done to the company, a personal claim by a shareholder against the wrongdoer to recover a sum equal to the diminution in the market value of his or her shares, or equal to the likely diminution in dividend, is misconceived.'[9] (Footnote omitted.)

In support of that proposition, reference is made to *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 (CA) at 366-367, in which it was pointed out that:

'Such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the nett assets of the company . . . The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves,

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[6] *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 at 550.
[7] *The Shipping Corporation of India Ltd v Evdomon Corporation & another* [1993] ZASCA 167; 1994 (1) SA 550 (A) at 566C-D.
[8] *S v De Jager* 1965 (2) SA 616 (A) at 625.
[9] 4(1) *Lawsa* 2 ed (2012) paras 67.

his right of participation, are not directly affected by the wrong doing. The plaintiff still holds all the shares as his own absolutely unencumbered property.'

[11] More recently, in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481; [2002] 2 AC 1 (HL), Lord Bingham of Cornhill observed:

'(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. So much is clear from *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, particularly at 222-223 . . . (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. . . . (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. . . .' [10]

[12] In my view, counterclaim A falls squarely within the first category alluded to by Lord Bingham. That being so, the following dictum from *Prudential Assurance* (at 222h-223b) is particularly apposite:

'But what [a shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent. shareholding. The plaintiff's

[10] *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 (HL) at 502. See also the judgments of Lord Hutton at 517 (51C-55G) and Lord Millett at 522 (61-66).

shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100 000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100 000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100 000 damages in addition to the £100 000 damages recoverable by the company.'

[13] According to the appellant, this case is distinguishable from those authorities because, so he asserts, Absa's conduct was 'intentional'. But, it matters not whether Absa's conduct was intentional or merely negligent for the wrong was committed against AMU and not the appellant. As *Country Cloud* (para 19) reminds us, the conduct must be wrongful, not in some general sense, but vis-à-vis the appellant. As the relationship between a company and shareholder is contractual in nature,[11] there can, it seems to me, be no basis for distinguishing this case from *Country Cloud*. Moreover, as *Country Cloud* makes plain, intentional conduct causing economic loss is not *per se* actionable and is certainly not unlawful where the conduct involved is conduct permitted by law. Here, one of the key allegations against Absa is that it 'intentionally' applied to court to liquidate AMU. The order was granted by the court and AMU was finally wound up. It can thus hardly be open to a shareholder thrice removed to contend that Absa, the major creditor of AMU, was legally not entitled to have applied to court to liquidate the

[11] With reference to *Gohlke and Schneider v Westies Minerale (Edms) Bpk* 1970 (2) SA 685 (A), and recently confirmed in *Communicare & others v Khan & another* [2012] ZASCA 180; 2013 (4) SA 482 (SCA) para 11.

company. To once again borrow from *Country Cloud* (para 43) 'if [Absa] acted permissibly in causing [the appellant] that loss, it does not matter that it did so intentionally'.

[14] The appellant calls in aid three decisions of the High Court in support of his claim. In the first, *McLelland v Hulett* 1992 (1) SA 456 (D), a shareholder of a company sued two of its directors for negligence, which had resulted in the diminution of the value of his shareholding in the company. Despite recognising that the directors' conduct was a wrong committed against the company, Booysen J found that the shareholder had a personal claim against the directors. In that regard he stated (at 467B-H):

'The rule in *Foss v Harbottle* [(1843) 67 ER 189] is not an absolute rule . . . While it is clear that the primary rule that a company must sue for a loss such as that in question in this case, and not a shareholder, is a logical reflection of the concept of limited liability, in practice the real reason why the rule must exist is linked more fundamentally to the separate existence of the company, with the result that, if the shareholder is allowed to sue, any wrongdoer will be subject to "double jeopardy" . . . Where, as in the present case, that risk is non-existent, and a shareholder is left with a diminished patrimony, the continued application of the rule would amount to an unwarranted and technical obstruction to the course of justice.'

[15] In the second, *Kalinko v Nisbet & others* 2002 (5) SA 766 (W), a shareholder sued the company's directors for a breach of their fiduciary duty, which allegedly resulted in the diminution of the value of his shares in the company. The shareholder sued personally, and not on behalf of the company. The defendant directors argued that the conduct complained of, at best, established that the company may have a claim against its directors to be pursued at the election of the company's liquidator. Claassen J disagreed. He stated (at 778D-779C):

'It has, however, been held that a shareholder should not be entitled to institute a derivative action where he complains that as a result of a wrong done to the company his shares have diminished in value in circumstances where the company itself has a claim against the wrongdoer for the loss suffered by it as a result of such wrong. This is so because to allow the shareholder a right to claim such loss could result in "double recovery" by both the shareholder and the company from the wrongdoer . . . In my view the mischief of a potential "double

recovery" is not a matter which is to be decided at the exception stage . . . Furthermore, it must be remembered that the rule in *Foss v Harbottle* is not an absolute rule. Where the risk of double jeopardy is non-existent and the shareholder is left with a diminished patrimony, the continued application of the rule in *Foss v Harbottle* would amount to an unwarranted and technical obstruction to the course of justice. See *McLelland v Hulett* 1992 (1) SA 456 (D) at 467B-H.'

[16] Both Booysen J and Claassen J overlooked the *dictum* of Innes CJ in *Dadoo Ltd v Krugersdorp Municipal Council,* that the conception of the existence of a company as a separate entity distinct from its shareholders is a matter of substance.[12] Instead they allowed the likelihood of double recovery (a reason for the rule) – or more accurately its absence – to become the basis for a novel exception to the rule. In *McCrae v Absa Bank Ltd*,[13] the third in the trilogy of cases relied upon by the appellant, a shareholder of a company sued the defendant bank for the diminution of the value of his shareholdings in four companies (where he was either the sole, or a substantial shareholder) caused by wrongful conduct of the bank in effecting unlawful transfers of ring-fenced funds belonging to the companies. The loss, so it would seem, had been suffered by the companies, and the bank's obligation had been to the companies, not to the shareholder. That notwithstanding, the shareholder sued in his personal capacity, not derivatively. Adopting the reasoning of Booysen J (in *McLelland*) and Claassen J (in *Kalinko*), Satchwell J dismissed the defendant's exception. In doing so, she made the same mistake as in the two earlier judgments of failing to first determine the logically anterior question, namely: into which of the three categories alluded to by Lord Bingham in *Johnson v Gore*, did the claim fall. Since the plaintiff in *McCrae* was not bringing a derivative action,[14] the rule in *Foss v Harbottle* should have been irrelevant to an evaluation of that claim. The key question in *McCrae* ought to have been whether the plaintiff had been independently wronged by the defendant. Instead of first asking that

[12] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550.
[13] *McCrae v Absa Bank Limited* unreported case no. 42229/2008 of the SGHC delivered on 7 April 2009.
[14] Broadly stated, a derivative action (also referred to as the exception to the rule in *Foss v Harbottle*) arises where a shareholder brings a claim on behalf of the company, to recover for the company a loss which he alleges has been sustained at the hands of the individuals in control of the company. The benefits of the action accrue to the company and not the shareholder. To the extent that the benefits improve the balance sheet or prospects of the company, the reflective benefit may be realised in the value of his shares.

question and determining into which category the claim fell, Satchwell J considered the possibilities of double recovery and, being on exception, held that she could not rule out the absence of a double recovery without evidence.[15] In failing to first resolve the anterior categorisation question, the learned judge allowed the enquiry into whether there might be a double recovery to determine whether there was an actionable duty owed to the shareholder.

[17] In *Fourway Haulage SA (Pty) Ltd v South African National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) para 25, Brand JA pointed out that: 'But the absence of indeterminate liability itself will not automatically give rise to the imposition of liability.' The same must hold true of the risk of double recovery. The fact that a double recovery may not be likely in a particular situation does not create an entitlement in the hands of a shareholder which he or she did not have in the first place. Where there is only one wrong; that was committed against the company, the risk of double recovery simply does not arise. The fact that the company has chosen not to sue, or is unable to sue, does not convert that wrong into a wrong against its shareholders. The risk of double recovery only becomes relevant when both the company and its shareholder(s) have been independently wronged (the third category in *Johnson v Gore*). It is thus necessary to first determine into which category a claim advanced by a shareholder properly falls.

[18] The final string to the appellant's bow on this leg of the case is that a claim such as this should not be decided on exception. It seems to me, however, that given the novelty of the claim and the clear legal principles involved this is 'quintessentially a matter that is capable of being decided on exception'.[16] In *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 para 3, Harms JA stated:

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[15] Paragraph 36.
[16] *AB Ventures Ltd v Siemens Ltd* [2011] ZASCA 58; 2011 (4) SA 614 (SCA) para 5, with reference to *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3.

'Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that "cuts through the tissue of which the exception is compounded and exposes its vulnerability".[17] Dealing with an interpretation issue, he added:

"Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts.'" (Footnotes omitted.)

[19] Here, there seems to be a fundamental illogicality to the litany of allegations relied upon by the appellant. It is common cause on the pleadings that Absa had lent AMU hundreds of millions of rands. Absa was a secured creditor with a pledge over the AMU shares held by QPG. On any reckoning, it had nothing to gain and everything to lose by a failure of AMU. What is more is that the focus of the appellant appears to be on the entitlement of a shareholder (in AMU) to pursue a claim for wrongs done to AMU. The additional shareholder levels (QPG and Compass) are simply ignored. But even if one were to assume in the appellant's favour that QPG as the sole shareholder in AMU had a right of action against Absa, it remains unclear on what basis Compass (as a 17.29 per cent shareholder in QPG) also acquired such a right.

[20] In upholding Absa's exception to counterclaim A, the SGHC recognised that the wrongs alleged to have been committed by Absa were all supposedly committed against AMU in breach of duties owed by Absa to AMU. It found no facts to have been pleaded that established a separate and independent duty owed to the appellant, a

[17] *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) at 715H.

shareholder in Compass (three shareholding levels removed from AMU), and that Absa's knowledge of his shareholding did not establish such duty. Consequently, the court correctly found that the appellant could not proceed against Absa for wrongs done to AMU. This principle found expression in the judgment of the English Court of Appeal in *Walker v Stones* [2001] QB 902 at 932-933; [2000] 4 All ER 412 (CA) at 438-9. Sir Christopher Slade there stated that a claimant is entitled to recover damages where:

'(a) the plaintiff can establish that the defendant's conduct has constituted a breach of some legal duty owed to him personally (whether under the law of contract, torts, trusts or any other branch of the law) and (b) on its assessment of the facts, the court is satisfied that such breach of duty has caused him personal loss, separate and distinct from any loss that may have been occasioned to any corporate body in which he may be financially interested. . .'

It follows that the appellant's appeal must fail with costs.

[21] Turning to Absa's cross-appeal: It relates to the dismissal of an exception. The question which at once suggests itself is whether that decision is appealable. According to *Maize Board v Tiger Oats Ltd & others* [2002] ZASCA 74; 2002 (5) SA 365 (SCA) para 14:

'In the light of this court's interpretation of s 20, the decisions in *Blaauwbosch*, *Wellington* and *Kett*, and the well-established principle that this court will not readily depart from its previous decisions, it now has to be accepted that a dismissal of an exception (save an exception to the jurisdiction of the court), presented and argued as nothing other than an exception, does not finally dispose of the issue raised by the exception and is not appealable. Such acceptance would on the present state of the law and jurisprudence of this court create certainty and accordingly be in the best interests of litigating parties.'

[22] It is so that Streicher JA said that in the context of s 20 of the now repealed Supreme Court Act 59 of 1959 and that ss 16 and 17 of the Superior Courts Act 10 of 2013 differ somewhat from that provision. But it was not suggested by Absa that anything should be made of the difference in language. Rather, so the argument went, whilst the *Maize Board* principle, the correctness of which has been accepted and

followed by a long line of cases in this court,[18] remained good under the new Act, it did not find application to a cross-appeal.

[23] Howie JA pointed out in *Guardian National Insurance Co Ltd v Searle NO* [1999] ZASCA 3; 1999 (3) SA 296 (SCA) at 301, that:

'As previous decisions of this Court indicate, 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 desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time. Where this approach has been relaxed it has been because the judicial decisions in question, whether referred to as judgments, orders, rulings or declarations, had three attributes. First, they were final in effect and not susceptible of alteration by the court of first instance. Secondly, they were definitive of the rights of the parties, for example, because they granted definite and distinct relief. Thirdly, they had the effect of disposing of at least a substantial portion of the relief claimed. In this regard see *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533B.'[19]

[24] In *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 at 601, Innes CJ said in respect of the question whether an order dismissing an exception was final:

'It was then laid down that a convenient test was to inquire whether the final word in the suit had been spoken on the point; or, as put in another way, whether the order made was reparable at the final stage. And regarding this matter from that standpoint, one would say that an order dismissing an exception is not the final word in the suit on that point [in] that it may always be repaired at the final stage. All the Court does is to refuse to set aside the declaration; the case proceeds; there is nothing to prevent the same law points being re-argued at the trial; and

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[18] See inter alia, *American Natural Soda Corporation & another v Competition Commission & others* 2003 (5) SA 655 (SCA) para 12; *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA); *B v S* 2006 (5) SA 540; [2006] 4 All SA 515 (SCA) para 20; *Gutsche Family Investments (Pty) Ltd & others v Mettle Equity Group (Pty) Ltd & others* 2007 (5) SA 491 para 12; *Van Niekerk & another v Van Niekerk & another* 2008 (1) SA 76 (SCA) para 4; *Charlton v Parliament of the Republic of South Africa* 2012 (1) SA 472 (SCA) para 19; *Carstens NO v Carstens* [2012] ZASCA 62 (SCA) para 1; *Picbel Groep Voorsorgfonds (In Liquidation) v Somerville & related matters* 2013 (5) SA 496 (SCA) para 6 and *Thulamela Municipality & another v T Tshivhase & others* [2015] ZASCA 57 (SCA) para 7.

[19] *Zweni* has been cited with approval by the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) para 49.

though the Court is hardly likely to change its mind there is no legal obstacle to its doing so upon a consideration of fresh argument and further authority.'

[25] I must confess to having some difficulty in fully understanding the distinction sought to be drawn by Absa. *Maize Board* laid down a general principle to the effect the dismissal of every exception (save an exception to the jurisdiction of the court), presented and argued as nothing other than an exception, is not appealable. Importantly, *Maize Board* drew no distinction between appeals and cross-appeals. A cross-appeal, as Schreiner JA pointed out in *Goodrich v Botha* 1954 (2) SA 540 (A) at 544, is 'simply an appeal which is conveniently tacked on to another appeal.'[20] And, in general, the rules applicable to appeals apply to cross-appeals. Moreover, the considerations of principle and policy alluded to above that militate against entertaining an appeal against the dismissal of an exception, must no doubt, apply with equal force to a cross-appeal against the dismissal of an exception. Any other approach would in effect mean that precisely the same issue, if raised by way of an appeal would not be appealable but if raised by way of a cross-appeal would be appealable. Why, it must be asked, should a cross-appellant be treated more favourably than an appellant? If, indeed, the final word is yet to be spoken on the points raised in counterclaim B, as both parties accepted before us, an appeal can hardly avail Absa at this stage. It follows that Absa's cross-appeal must fail with costs.

[26] In the result:

Save for affording the appellant 15 days to deliver a notice to amend counterclaim A, if so advised, the appeal is dismissed and the cross-appeal is struck from the roll in each instance with costs.

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V M Ponnan

Judge of Appeal

[20] See also *Gentiruco AG v Firestone SA* (*Pty*) *Ltd* 1972 (1) SA 589 (A) at 606H-608A; *National Union of Metalworkers of SA v Henred Fruehauf Trailers* [1994] ZASCA 153; 1995 (4) SA 456 (A) at 475F-G and 4 *Lawsa* 3 ed (2011) para 410.

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