THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 502/2023

In the matter between:

WILLEM TOBIAS HANEKOM N O	**FIRST APPELLANT**
LOURENS HERMANUS TALJAARD N O	**SECOND APPELLANT**
THE COMMUNITY SCHEMES OMBUD SERVICE	**THIRD APPELLANT**
ZAMA MATAYI N O	**FOURTH APPELLANT**

and

NUWEKLOOF PRIVATE GAME RESERVE FARM OWNERS' ASSOCIATION	**RESPONDENT**

Neutral citation: *Hanekom N O and Others v Nuwekloof Private Game Reserve Farm Owners' Association* (502/2023) [2024] ZASCA 154 (12 November 2024)

Coram: PONNAN, MAKGOKA and WEINER JJA and MANTAME and MASIPA AJJA

Heard: 10 September 2024

Delivered: 12 November 2024

Summary: Appeal from adjudicator under the Community Schemes Ombud Service Act 9 of 2011 to the high court – two judges of the high court hearing appeal – nature of proceedings before the adjudicator and the high court – whether leave to appeal to this Court should have been sought from the high court in terms of s 16(1)*(a)* of the Superior Courts Act 10 of 2013 (the SC Act) or special leave to appeal from this Court in terms of s 16(1)*(b)* and 17(3) of the SC Act adjudicator performs an administrative function – high court sits as a court of first instance – special leave to appeal granted by this Court a nullity – no jurisdiction to hear the appeal.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Nuku and Nziweni JJ, sitting as court of first instance):

The appeal is struck from the roll with costs, including the costs of two counsel, where so employed.

JUDGMENT

Weiner JA (Mantame AJA concurring)

Introduction

[1] This appeal arises from an order of the Western Cape Division of the High Court (the high court), which set aside an order of the fourth appellant, the Community Schemes Ombud Service (the CSOS) adjudicator (the adjudicator). Although the question raised in this appeal was the correctness of the adjudicator's decision, a preliminary point arose, and this Court must first decide whether it has jurisdiction to entertain this appeal. The primary question in this appeal is whether the high court (consisting of two judges) sat as a court of appeal in respect of the adjudicator's decision under the Community Schemes Ombud Service Act 9 of 2011 (the Act) or as a court of first instance. If the high court sat as a court of first instance, the appellants should have sought leave to appeal from the high court in terms of s 16(1)*(a)*[1] of the Superior Courts Act 10 of 2013 (the

[1] Section 16(1)(*a*) of the Superior Courts Act 10 of 2013 (the SC Act) provides:
'(1) Subject to section 15 (1), the Constitution and any other law-
(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted-

SC Act) and not special leave to appeal from this Court, in terms of ss 16(1)*(b)*[2] and 17(3)[3] of the SC Act, as they did.

[2] The first and second appellants are cited herein in their official capacities as trustees of the WTH Trust (the Trust), established and registered with the Master of the High Court under number IT 954/2011. The Trust owns one of the properties in the Nuwekloof Private Game Reserve (the Reserve). The third appellant is the CSOS, a juristic person established in terms of s 3 of the Act. It provides a dispute resolution service in respect of a community scheme. The fourth appellant is Zama Matayi N O cited in her official capacity as the adjudicator, appointed as such in terms of s 21(2)*(b)* of the Act. The third and fourth appellants take no part in these proceedings.

[3] The respondent is the Nuwekloof Private Game Reserve Farm Owners' Association (the Association), a voluntary association which manages the Reserve. The Reserve comprises six properties owned by various owners, which have been leased to the Association. The Reserve is a community scheme as defined in the Act.

Background facts

[4] The trustees of the WTH Trust (the Trust) concluded an agreement of sale with the trustees of the Nuwekloof Trust in terms of which the Trust purchased Portion 5 of the Farm 320, in the Kannaland Municipality, Ladysmith, Western

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(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17 (6); or
(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;'

[2] Section 16(1)*(b)* provides:
'[A]n appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.'

[3]Section 17(3) of the SC Act provides:
'An application for special leave to appeal under section 16 (1) *(b)* may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed, and the provisions of subsection (2) *(c)* to *(f)* shall apply with the changes required by the context.'

Cape (the property). In terms of the sale agreement, the Trust, upon registration of transfer of the property into its name, became a member of the Association.

[5] The Trust failed to pay certain levies to the Association, which invoked clause 5.13 of the Association's 2017 Constitution[4] which provided:

'When a Member is in default of any payment obligation (general and/or special levies and/or obligatory loans), or any other obligation as set out herein, to the Association the defaulting Member shall (unless otherwise determined by the Trustees) not be entitled to any of the privileges of Membership including (but not limited to):

5.13.1 his right to access and/or use of the Reserve and/or any of the common property and/or any Services;

5.13.2 his right to vote in regard to any aspect;

until he shall have paid the full amount due, together with interest and costs and/or any other amount which may be due and payable by him and/or had rectified any other breach in terms hereof, to the Association.'

[6] On 24 February 2022, the Trust applied to the CSOS in terms of s 38 of the Act[5] for an order declaring clause 5.13 of the 2017 Constitution invalid. On 11 August 2022, the adjudicator made an order in which the relief sought by the Trust was granted. The adjudicator declared clause 5.13 to be invalid and set it aside and ordered the Association to remove clause 5.13 from its 2017 Constitution. The Association, being dissatisfied with the adjudicator's order, appealed to the high court in terms of section 57(1) of the Act[6] to have the order set aside. In terms of s 57(1) of the Act, an appeal against the adjudicator's decision is limited to a question of law. To bring its appeal within the purview of

[4] There is a dispute over whether the Trust was bound by the Constitution, which it had not signed, but that issue is not relevant to the appeal, in view of the decision to which I have come.

[5] Section 38(1) of the Community Schemes Ombud Service Act 9 of 2011 (the Act) provides:

'(1) Any person may make an application if such person is a party to or affected materially by a dispute.'

[6] Section 57(1) of the Act provides:

'(1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.'

that provision, the Association contended that the adjudicator erred in law by holding that clause 5.13 was contrary to public policy.

[7] The appeal served before two judges of the high court, on 18 November 2022, and it delivered its judgment on 30 January 2023. It upheld the Association's appeal; the order made by the adjudicator was set aside; and the adjudicator's order was replaced by one in which the Trust's application was dismissed.

[8] The trustees thereafter applied in terms of s 16(1)*(b)* and 17(3) of the SC Act to this Court for special leave to appeal, which was granted on 5 May 2023. The Trust contended that this Court, accordingly, has jurisdiction to hear this appeal.

Status of the appeal

[9] Section 57(1) of the Act provides; 'An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the [h]igh [c]ourt, but only on a question of law'. The Association contends that such an appeal is similar, in material respects, to an appeal against a decision of the National Consumer Tribunal under the National Credit Act 34 of 2005 (the NCA). In *National Credit Regulator v Lewis Stores (Pty) Ltd and Another (Lewis)*,[7] this Court held that such an appeal is a statutory appeal and not a 'judicial appeal' and therefore the court seized with such an appeal is a court of first instance. Accordingly, the proper approach in such cases is to follow the procedure set out in s 16(1)*(b)* of the SC Act. Thus, the Association argues that having not sought and obtained leave from the high court, this Court had no jurisdiction to hear the appeal.

[7] *National Credit Regulator v Lewis Stores (Pty) Ltd and Another (Lewis)* [2019] ZASCA 190; 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA) para 56.

[10] It was submitted by the Trust that an adjudication in terms of the CSOS is not an administrative appeal and (contrary to the decision in *Lewis*) because s 56(2)[8] of the Act requires the registrar of a court to register an adjudication order as an order of the high court. But this submission ignores the fact that s 152 of the NCA[9] also provides that any order of the National Credit Tribunal may be enforced '*as if it were an order of the [h]igh [c]ourt*'. In *Lewis*, this Court found that that provision did not change the status of the statutory appeal to a judicial appeal.

[11] Despite the fact that the registrar of the court is required to register the order as an order of court in terms of s 56, this does not alter the principle that the status of an adjudication order remains an administrative decision. The order must only be registered if a party lodges the order and requests registration.[10] The registration is an administrative formality to facilitate enforcement, when invoked. That formality, which only arises when the party wishes to enforce the order, does not convert the substantive nature of the original decision from an administrative one to a judicial one.

[12] This Court, in *Lewis*, considered why it was undesirable that s 16(1)*(b)* of the SC Act should apply to appeals from bodies outside the judicial system. It bears repeating what was said in *Lewis*, as such principles apply with equal force to appeals from the adjudicator under the CSOS. Wallis JA stated as follows:

'In principle there are a number of reasons why s 16(1)*(b)* of the SC Act should be confined to applications for leave to appeal against decisions by the high court given on appeal to it from

[8] Section 56(2) of the Act provides:
'(2) If an adjudicator's order is for the payment of an amount of money or any other relief which is beyond the jurisdiction of the magistrate's court, the order may be enforced as if it were a judgment of the High Court, and a registrar of such a Court must, on lodgement of a copy of the order, register it as an order in such Court.'
[9] Section 152 of the National Credit Act 34 of 2005 provides:
'(1) Any decision, judgment or order of the Tribunal may be served, executed and enforced as if it were an order of the High Court. . .'
[10] CSOS Practice Directive on Dispute Resolution of 2019, para 31.4.

other courts within the judicial system, that is, the magistrates' courts and full bench appeals from the high court sitting at first instance. The first is that there is a fundamental difference between an appeal from a court and an appeal from a body outside the judicial system. The latter may be an administrative tribunal, or a board or official dealing with purely administrative matters, where the decision in question may have little or no legal content, but may be a matter of administrative discretion. The 'appeal' brings it before the court for the first time. By contrast, once a matter has been heard by a court of first instance and the dissatisfied party has exercised a right of appeal, the right to a further appeal should depend not only on the question whether there are reasonable prospects of success, but also on the existence of some compelling circumstances warranting a further appeal. The reason for such a limitation lies in the principle that there should be finality in litigation. Accordingly, the law places a limit on the number of appeals that may be pursued within the court system and empowers appellate courts to regulate the cases that come to them by way of provisions requiring leave to appeal from those courts.[11]

The second point of principle lies in the fact that an appeal within the justice system is a clearly defined process, whereby the correctness of the decision of the court appealed from is assessed within defined boundaries. The appeal proceeds on the record of the proceedings in the lower court and the factual findings of that court and its exercise of discretion in reaching its decision are given respect and only departed from on limited grounds. That is by no means true of statutory appeals from tribunals and officials.'[12]

The first issue in a statutory appeal is to ascertain the nature of the right of appeal conferred by the statute. In determining that question courts follow the taxonomy laid down by Trollip J in *Tikly v Johannes*. … Unlike appeals within the judicial system therefore statutory appeals may have a widely varying nature and involve different types of hearing.[13]

The third point concerns the nature of a statutory appeal and the terms in which the right of appeal is granted. These may, when properly construed, mean that the appeal to the high court is final and not subject to any further appeal at all. That may especially be the case when the statute provides that the decision by the court will stand in the place of or be deemed to be the decision of the original decision-maker. If the appeal to the high court is taken to result in a

[11] *Lewis* para 50.
[12] Ibid para 51.
[13] Ibid para 52.

decision by that court given on appeal to it there will be conflict between the statute conferring the right of appeal and the SC Act. That is manifestly undesirable.[14]

The fourth point is that it is almost inevitable, as recognised expressly in s 148(2)*(a)* of the NCA, that the decisions of statutory bodies and officials in these matters will constitute administrative action and be subject to judicial review under the provisions of PAJA. Such proceedings are conventionally pursued in the high court before a single judge sitting at first instance. That judge will deal with the question of leave to appeal against the judgment and may direct that it be heard before either a full court or this court, depending on the nature and complexity of the issues raised. It seems anomalous that, if the dissatisfied party was content to proceed by way of an appeal on the record of the administrative decision-maker, any appeal flowing from the judgment would require special leave to appeal from this court, when common experience teaches that there may be considerable overlap between appeal and review grounds.[15]

Finally, I revert to the point made earlier that the test for granting special leave to appeal is more stringent than the test for leave to appeal, Given the fact that restrictions on the right of appeal have been held by the Constitutional Court to constitute a limitation on the right of access to courts under s 34 of the Constitution, it seems to me that we should prefer an interpretation of s 16(1)*(b)* that least restricts the ability of a disappointed litigant to seek relief by way of an appeal within the justice system.[16]

For those reasons I conclude that an appeal from the decision of a high court under s 148(2)*(b)*, whether constituted of a single judge, or two judges, or as a full court, lies with leave of that court sitting as a court of first instance. Such leave should be sought in terms of s 16(1)*(a)* of the SC Act and not by way of an application for special leave to appeal from this court.'[17] (footnotes omitted).

[13] As pointed out in *Lewis*,[18] where the decision of the statutory body is also subject to judicial review, an anomaly would arise between the situation where there is an appeal against a review judgment and the situation where there is an

[14] Ibid para 53.
[15] Ibid para 54.
[16] Ibid para 55.
[17] Ibid para 56.
[18] *Lewis* para 56.

appeal against a statutory appeal judgment, if the latter would always require special leave from this Court, but the former would not. This too, points to the conclusion that the appeal is not a judicial appeal.

This Court's inherent powers under s 173 of the Constitution

[14] The Appellants have submitted in the alternative that in the 'special circumstances' of this case,[19] this Court should exercise its inherent powers under s 173 of the Constitution, to regulate its own procedure, by deciding this appeal. For this proposition, the appellants relied on the exception carved out in *Lewis*. There this Court found that leave should have been granted by the high court, and not by this Court.[20] As a result, the order of this Court granting special leave was a nullity. Despite this finding, the Court heard the appeal, based on what it considered 'special circumstances.' Those included that the parties came in good faith having received special leave to appeal from this Court.[21] To strike the appeal from the roll, reasoned Wallis JA, would be a gross technicality and waste of resources, given that the parties were likely to revert to the high court to seek leave, and if refused, they would end up again in this Court.[22] These considerations, the court concluded, constituted 'special circumstances in which the court can in the exercise of its inherent jurisdiction to regulate its own procedure condone the irregular manner in which this appeal reached us.'[23]

[15] A similar approach was taken in *Gaone Jack Siamisang Montshiwa (Montshiwa*),[24] where the court of first instance comprised two judges. The application for leave to appeal was considered, and refused, by a single judge.

[19] Special leave to appeal having been granted by this Court, without demur from the respondents. The appellants contending that if special leave was granted, it follows that leave would have been granted by the high court.
[20] *Lewis* op cit para 56.
[21] Ibid para 57.
[22] Ibid.
[23] Ibid para 58.
[24] *Gaone Jack Siamisang Montshiwa (Montshiwa)* (Ex Parte Application) [2023] ZASCA 19; 2023 JDR 0647 (SCA).

The applicant applied to this Court for leave to appeal. The minority held that the proceedings in the application for leave to appeal were irregular and the consequent order a nullity. As such, the matter ought to have been struck from the roll. The majority reasoned that to strike the matter from the roll would have amounted to an absurdity as in all probability, the matter would end up before this Court again. This would serve only to waste the Court and the applicant's resources. The majority consequently held that by virtue of this Court's inherent powers under s 173 of the Constitution, it was entitled to consider the merits of the application for leave to appeal and, if appropriate, to determine the appeal. It did so and dismissed the application.

[16] The Trust urged upon us to follow the same approach adopted in *Lewis* and *Montshiwa*. With specific reference to *Lewis*, it was contended that there are also 'special circumstances' to hear the appeal. The same circumstances as relied upon in *Lewis*, were cited by the appellants. But these circumstances were all considered in *Lewis*, when Wallis JA cautioned that the result in that case was an 'exception' which would not apply again, as parties were now aware of the correct procedure to follow in cases such as the present.[25] It is clear that Wallis JA did not seek to lay down a general exception.

[17] Heeding both Wallis JA's cautionary note, and previous authorities dealing with the issue of lack of jurisdiction, this Court is at liberty not to follow the approach taken in *Lewis* and *Montshiwa* and refuse to entertain this appeal. Both *Lewis* and the majority in *Montshiwa* acknowledged that they did not have jurisdiction to hear the matters before them. However, they adopted what they deemed a pragmatic approach. The approach adopted does not accord with the

[25] *Lewis* para 58.

earlier jurisprudence of this Court. It is trite that this Court can only entertain an appeal, if it has jurisdiction to do so. As stated in *Moch v Nedtravel (Pty) Ltd*:[26]

'[L]eave to appeal is one of the jurisdictional requirements of ss 20 and 21 of the Supreme Court Act . . .and the petitioner did not seek leave from the court *a quo* to appeal against the final order. . . That being the case this court is not competent either to grant leave or to entertain an appeal against the final order without leave. . .[T]his court's "inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice" does not extend to the assumption of jurisdiction not conferred upon it by statute. *Rex v Milne and Erleigh* (6) 1951 (1) (A) SA 1 at 5 *in fin*,

"[this] Court was created by the South African Act and its jurisdiction is to be ascertained from the provisions of that Act as amended from time to time and from any other relevant statutory enactment."

Nowadays its jurisdiction derives from the Supreme Court Act and other statutes but the position remains basically the same.'[27]

[18] The court's inherent power under s173 of the Constitution cannot be resorted to when the court lacks jurisdiction. As Bosielo JA explained in *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA) para 17:

'A court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In this regard see National Union of *Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd* where this Court stated that: "While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute".

[19] Thus, if the high court was sitting as a court of first instance, leave to appeal should have been sought from it. That being so, this Court did not have jurisdiction and erroneously granted special leave to appeal. Such order is a nullity and can, as found in *Master of the High Court Northern Gauteng High*

[26] *Moch v Nedtravel (Pty) Ltd. t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (SCA).
[27] Ibid para 4 and 32.

Court, Pretoria v Motala NO and Others (Motala),[28] be disregarded by this Court, where Ponnan JA, stated:

'Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing. For as Coetzee J observed in *Trade Fairs and Promotions (Pty) Ltd v Thomson & another* 1984 (4) SA 177 (W) at 183E: "[i]t would be incongruous if parties were to be bound by a decision which is a nullity until a Court of an equal number of Judges has to be constituted specially to hear this point and to make such a declaration".'[29]

[20] In *Department of Transport and Others v Tasima (Pty) Limited*,[30] the Constitutional Court held that:

'*Motala* is only authority for the proposition that if a court "is able to conclude that what the court [that made the original decision] has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded" . . . *Motala* correctly holds that where an order is made without jurisdiction. . . another court may refuse to enforce it. Again, it is the court that is entitled to act, not the party.'[31]

[21] This Court is, accordingly, not bound to follow the decisions in *Lewis* and *Montshiwa*, which appear to be clearly wrong. As stated in *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others:*[32]

'A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous.'

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[28] *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA).
[29] Ibid para 14.
[30] *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC).
[31] Ibid para 197 and fn 156 therein.
[32] *Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) para 3.

[22] As this Court lacked jurisdiction to grant special leave to appeal, the matter is not properly before us. We are accordingly not free to enter into the substantive merits of the appeal.

[23] The following order is made:
The appeal is struck from the roll with costs, including the costs of two counsel, where so employed.

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S E WEINER
JUDGE OF APPEAL

Ponnan JA (Makgoka JA and Masipa AJA concurring)

[24] The preliminary question that confronts us in this matter is whether we have jurisdiction to entertain the appeal. As a starting point this Court does not have any original jurisdiction.[33] Its jurisdiction is derived from the Constitution and is principally limited to decide appeals and issues connected with appeals (which includes applications for leave to appeal).[34]

[25] The jurisdictional requirements for a civil appeal from the high court sitting as a court of first instance are twofold: first, there is a 'decision' of that court within the meaning of s 16(1)*(a)* of the SC Act; and, second, the required leave to appeal has been granted under s 17(2) of the SC Act.[35] Both requirements must be met. It is only the second that occupies our attention in this matter. The right

[33] *Moch* fn 26 paras 4-5; *Pharmaceutical Society of South Africa and Others v Minister of Health and Another; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang and Another* [2004] ZASCA 122; 2005 (3) SA 238 (SCA); [2005] 1 All SA 326 (SCA); 2005 (6) BCLR 576 (SCA) para 19 (*Pharmaceutical Society*).
[34] Ibid; Constitution s 168(3); *S v Basson* [2004] ZACC 13; 2004 (6) BCLR 620 (CC) para 103.
[35] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531B-C; *DRDGOLD Limited and Another v Nkala and Others* [2023] ZASCA 9; 2023 (3) SA 461 (SCA) (*DRDGOLD*) para 17.

to appeal to this Court is neither automatic, nor absolute, since leave to appeal is required. Leave is a condition for exercising the right or, put differently, it is a jurisdictional fact for an appeal. As Brand JA said in *Newlands Surgical Clinic*:

'Leave to appeal . . . constitutes what has become known, particularly in administrative law parlance, as a jurisdictional fact. Without the required leave, this court simply has no jurisdiction to entertain the dispute.'[36]

[26] Where, as here, the high court, whose judgment is sought to be appealed, sat as a court of first instance, it must first be approached for leave. If that is granted, the condition is met. If it is refused, the party wishing to appeal has a right to petition this Court for such leave. As Corbett CJ pointed out in *National Union of Metalworkers of SA v Jumbo Products CC* (*Jumbo Products*):

'. . . no appeal lies to this Court . . . except either where the Court a quo has itself granted leave to appeal or where, the Court a quo having refused such leave, such leave has been granted by this Court. Thus, as is clear from the subsection, this Court's jurisdiction to grant leave itself is dependent on the Court a quo having refused such leave. The proper procedure, as imperatively laid down by section 20(4)*(b)*, is for the would-be appellant to apply for leave first to the court against whose judgment the appeal is to be made. If that Court grants leave, then this Court may entertain the appeal. If that Court refuses leave, then (but only then) may this Court consider an application for leave to appeal. Thus section 20(4)*(b)* not only prescribes the proper procedure, but it also defines the jurisdiction of this Court to entertain an application for leave to appeal.'[37]

Although, said with reference to s 20(4)*(b)* of the Supreme Court Act 59 of 1959[38] (the predecessor to the SC Act), the principle so firmly established in *Jumbo Products* applies equally here.

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[36] *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 SCA; [2015] 2 All SA 322 (SCA) para 13.

[37] *National Union of Metalworkers of SA v Jumbo Products CC* [1996] ZASCA 87; 1996 (4) SA 735 (A) 740A-D.

[38] Section 20(4) provides: 'No appeal shall lie against a judgment or order of the court of a provincial or local division [read: high court] in any civil proceedings . . . except -

. . . .

(b) . . . with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the [Supreme Court of Appeal].'

[27] It must thus follow that the order granting special leave to the appellant to appeal to this Court is a nullity. The consequence, ordinarily at any rate, is that the matter falls to be struck from the roll. However, the contention advanced is that this Court can, in the exercise of its inherent jurisdiction to regulate its own procedure, entertain the appeal. In that regard, reliance was placed on the approach adopted in *Lewis*,[39] which thereafter found favour with the majority in *Montshiwa*.[40]

[28] Although this Court, like the Constitutional Court and High Courts, has the inherent power to protect and regulate its own process, that 'does not extend to the assumption of jurisdiction not conferred upon it by statute.'[41] If the Constitution or a statute does not provide for such a right that is the end of the matter and this Court cannot assume the power.[42] As Van der Merwe JA observed in *DRDGOLD Limited v Nkala*:

'This court has no original jurisdiction and its common law inherent power to regulate its own procedures – now entrenched in s 173 of the Constitution – does not clothe it with jurisdiction.'[43]

[30] No authority was cited in *Lewis* for the rather radical departure from the established jurisprudence of this Court. Indeed, as Innes CJ made plain in *Jumbo Products*, this Court's jurisdiction to grant leave itself is dependent on the high court having refused such leave. The would-be appellant in *Lewis* did not apply for leave from the court of first instance and thus failed to take the first step.[44] Therefore, as the high court in *Lewis* had not refused leave, it was not open to this Court to even consider an application for leave to appeal, much less deal with the

[39] *Lewis* paras 57-58.
[40] *Montshiwa* para 26.
[41] *Moch* paras 4-5. See also *Sefatsa v Attorney-General, Transvaal* 1989 (1) SA 821 (A) at 834E.
[42] *Pharmaceutical Society* para 20.
[43] *DRDGOLD* fn 35 para 13.
[44] *Pharmaceutical Society* para 23.

appeal on its merits. The matter was approached on the footing that had leave to appeal been sought from the high court it would have been refused and, inasmuch as an application for special leave had succeeded, ordinary leave would have been granted by this Court on petition to it.

[31] The Court accordingly entered into the merits in *Lewis* without the required leave and absent a necessary jurisdictional fact. In that, it took the view that it could 'in the exercise of its inherent jurisdiction to regulate its own procedure condone the irregular manner in which this appeal reached us'.[45] However, absent the requisite leave, this Court lacked jurisdiction and could not 'condone the irregular manner in which the appeal had reached [it]' – certainly not by dint of 'the exercise of inherent jurisdiction to regulate its own procedure'. Inasmuch as the Court had no jurisdiction to dispose of the matter, the only course open to it, were it disinclined to strike the appeal from the roll as being a nullity, would have been for it to defer the hearing or determination of the appeal to enable the appellant to obtain the necessary leave.[46] However, as Harms JA pointed out in *Pharmaceutical Society*, 'the circumstances should be appropriate before this extraordinary procedure may be adopted'.[47]

[32] I do not subscribe to the view that it was open to this Court 'to carve out an exception' (the exact contours of which remain undefined) in *Lewis* or to adopt a 'pragmatic approach' in *Montshiwa*, to the question of jurisdiction. As a matter of simple logic, the Court in each instance either had jurisdiction to entertain the appeal or it did not. If it did not, that ought to have been the end of the matter. Jurisdiction is a logically anterior question. In *Lewis*, two judgments were penned. Both dealt fairly extensively with the issues raised and the substantive

[45] *Lewis* para 58.
[46] See *Pharmaceutical Society* paras 25–26 and the cases there cited.
[47] Ibid para 26.

merits of the appeal. Although jurisdiction merited a mention in the last two paragraphs of the second judgment, the question, in truth, remained unresolved, because the stance adopted was that the Court could condone the irregular manner in which the appeal had reached it. In my view, however, it could not by the simple expedient of the grant of condonation clothe itself with jurisdiction that it did not otherwise possess.

[33] The considerations that weighed with the court in *Lewis*, which came to be described as 'special circumstances', could hardly be invoked to trump principle. And, despite the cautionary note in that matter that the special circumstances of the case will not be repeated, it will not take a great deal of ingenuity for other would-be appellants to contend, as in *Montshiwa* and this matter, that there are indeed special circumstances present that warrant a consideration of their appeal.

[34] As the minority put it in *Montshiwa* (per Siwendu AJA, Van Der Merwe JA concurring):

'Significantly, several decisions by this Court consistently affirm that absent leave being granted, it lacks the jurisdiction to entertain an appeal. The decision *in Absa Bank Ltd v Snyman* (*Absa Bank*) illustrates this point. There, the court confirmed another decision by this Court in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd (Newlands)* where under the rubric of an 'inherent reservoir of power to regulate its procedures in the interest of proper administration of justice' the court deliberated on whether it may entertain a matter not the subject of the order granting leave to appeal. Confirming the often-cited decision of this Court in [*Moch*], it held that such a power does not extend to an assumption of jurisdiction not conferred upon it by statute. The upshot of these decisions, which have not been set aside, is that this Court's inherent power to regulate its affairs, condone an irregularity or address prejudice predominantly applies to matters regulated by its rules and not to matters not expressly provided by the governing statute. Even there, the power will be exercised sparingly . . .'[48]

[48] *Montshiwa* para 18.

[35] It is thus well-settled that this Court cannot, under the guise of exercising its inherent power, enter into the merits of an appeal over which it has no jurisdiction. Jurisdiction is a necessary precondition for the exercise of its inherent power. The conclusion that the order granting leave was a nullity and that we therefore lack jurisdiction, has to be the end of the matter. In my view, it must follow from this that the contrary approach adopted in *Lewis* and by the majority in *Montshiwa* is plainly wrong.

[36] Before concluding, it is perhaps necessary to address the apparent incongruity in adopting the reasoning in *Lewis*, as Weiner JA has done, in the face of the conclusion that the Court in that matter suffered a want of jurisdiction. It seems to me that even if the dicta relied on by Weiner JA were to be regarded as having no status other than that of an expression of opinion by one Judge of Appeal, concurred in by four others, its persuasive value is irresistible, with which we would not readily disagree.[49] In that regard, the following by Schreiner J, albeit in a different context in *Petersen v Jajbhay*, is instructive:

'I come now to the argument relating to the remarks made by the Chief Justice and Mr Justice Watermeyer in *Jajbhay v Cassim*. It is contended that those expressions of opinion were *obiter dicta* and that I should examine the whole question afresh in the light of the actual decision given in that case. Now, there is no doubt that *obiter dicta*, however weighty, are not entitled to be regarded as binding upon any court however humble it might be. An inferior Court – a magistrate's court – is entitled to disagree with an *obiter dictum* in the Appellate Division or in the Privy Council. And indeed if a magistrate holds a clear view of the wrongness of such a dictum it is his duty if there are no actual decisions binding him to give effect to the view he holds. But I do not think that in the present case it is either necessary or desirable for me to pass by the views expressed by the Chief Justice and Watermeyer J, and to embark on a re-examination of the position in the light of the decision in order to see whether I agree with the views expressed by those learned Judges. The statements in question were deliberate statements

[49] *Durban City Council v Kempton Park (Pty) Ltd* 1956 (1) SA 54 (N) at 59D-F and *Rood v Wallach* 1904 TS 187 at 195-6.

closely related to the actual basis of a decision and they were intended to deal with cases of the class which I have now to deal with. If I felt that those statements expressed a view with which I disagree I would be obliged to investigate the matter further and more closely. Even though I am not obliged to do so I am of course entitled to re-investigate the foundation of those statements assuming, as I do, that they are *obiter dicta*. But I am not disposed to do so because the views there expressed, if I may respectfully say so, appeal to me as in conformity with public policy and sound reason.'[50]

[37] In the result, I agree with the conclusion reached by Weiner JA that the matter falls to be struck from the roll.

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V M PONNAN
JUDGE OF APPEAL

[50] *Petersen v Jajbhay* 1939 TPD 182 at 185. See also *Turnbull-Jackson v Hibiscus Coast Municipality and Others* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) paras 54-71.

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