

Dispute Resolution

ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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What constitutes “*special circumstances*” in an application to the Supreme Court of Appeal, for special leave to appeal

Section 17(3) read with section 16(1)(b) of the Superior Courts Act 10 of 2013 provides for an application for special leave to appeal to the Supreme Court of Appeal (SCA). According to the SCA, special circumstances may arise if the appeal deals with a substantial point of law, or the matter is of great importance to the parties or the public, or where the prospects of success on appeal are so strong that the refusal to grant leave to appeal would result in a denial of justice for the party seeking leave to appeal.



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What constitutes “special circumstances” in an application to the Supreme Court of Appeal, for special leave to appeal

Section 17(3) read with section 16(1)(b) of the Superior Courts Act 10 of 2013 provides for an application for special leave to appeal to the Supreme Court of Appeal (SCA). According to the SCA, special circumstances may arise if the appeal deals with a substantial point of law, or the matter is of great importance to the parties or the public, or where the prospects of success on appeal are so strong that the refusal to grant leave to appeal would result in a denial of justice for the party seeking leave to appeal.

Generally speaking, where an exception is upheld, that order upholding the exception is appealable and where an exception is dismissed, that order dismissing the exception is not appealable. The reason for this is that the point raised in the exception can be reargued at trial.

The SCA recently had to grapple with an application for special leave to appeal, where in *TWK Agriculture Holdings (Pty) Ltd vs Hoogveld Boerderybeleggings (Pty) Ltd 273/2022*, the Middelburg High Court upheld an exception, the Middelburg Full Court then upheld the plaintiff’s appeal, and dismissed the defendant’s exceptions. The defendant then proceeded with an application for special leave to appeal to the SCA.

The application for special leave to appeal was granted by two judges of the SCA, without hearing oral argument. However, the full bench of the SCA said that it was not bound by the decision that special leave was granted by two judges, and the appellant had to convince the full bench that the two judges were correct in granting special leave.

Facts

The facts served before the courts can be summarised briefly as follows.

The private company in question – the defendant in the action – had a single class of shares. The defendant, following the correct procedure required by the Companies Act 71 of 2008 (Companies Act), amended its memorandum of incorporation to expand the existing definition of “related persons”. A group of minority shareholders, dissatisfied with the amendments to the memorandum of incorporation, issued a summons out of the Middelburg High Court, alleging that the appraisal rights sourced in section 164 read with section 37(8) of the Companies Act had been triggered.

The defendant raised two exceptions to the particulars of claim on the basis that it failed to establish a cause of action. The first exception raised was that the appraisal remedy cannot be invoked where the company has a single class of shares. Secondly, if the appraisal remedy were to apply to a



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company with a single class of shares, then it can only apply if the rights attaching to all the class of shares, and not just some of the shares are affected by the amendment. In this instance, it was only the minority shareholders that were dissatisfied with the amendment to the memorandum of incorporation.

The crisp issue that was before the SCA was whether the appraisal remedy is applicable if there is only one class of shares. This issue had not been the subject matter of any reported judgment, was a substantial point of law and was of great importance to the parties – so great that both parties argued and urged the SCA to deal with the issue. In addition, so the appellant argued, if the SCA refused to deal with the issue, the matter would be referred back to the trial judge, and the trial judge was bound by the interpretation given by the Full Court to section 164 of the Companies Act. It would therefore be in the interests of justice for the SCA to entertain the appeal.

The SCA took a different approach. It asked if the SCA should determine whether a decision of the High Court or Full Court is appealable by recourse to the overarching principle of the interests of justice. Referencing the doctrine of finality, the SCA held that the High Court should bring finality to the matter before it, and only then would the matter be capable of being before the SCA. This would allow for greater certainty to litigants on whether a matter is appealable or not.

The SCA held that the orders of the Full Court did not meet the requirements for appealability to the SCA, and despite special leave having been granted by two judges of the SCA, the appeal was not properly before the SCA, and it was struck from the roll.

Eugene Bester



Cliffe Dekker Hofmeyr

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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