

SOUTH AFRICA / JUDGMENT

Monyeki and Another v Regional Land Claims Commission and Another (LCC18/2004) [2008] ZALCC 6 (1 January 2008)

[2008] ZALCC 6

COURT
Land Claims Court

BEFORE
Gildenhuys, Pienaar

CASE / FILE NUMBER
LCC18/2004

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IN THE LAND CLAIMS
COURT OF SOUTH AFRICA
HELD AT RANDBURG
Case No: LCC18/2004
In

the matter of:

S
J MONYEKI
1st
Applicant
E
M MONYEKI (MAKGAI) 2nd
Applicant
and
REGIONAL
LAND CLAIMS COMMISSION
1st
Respondent
PORTION
608 NEW BELGIUM CC
2nd
Respondent

Concerning:

THE
REMAINING EXTENT OF PORTION 9 OF THE FARM NEW BELGIUM 608 LR

JUDGMENT

Gildenhuys J

- [1] This is an application for leave to appeal against a “judgment and order” made by me in the course of hearing this matter on 4 December 2008. The “judgment and order” referred to is the dismissal of an application made from the bar by Mr Shakoane (who appeared on behalf of the plaintiffs) for a postponement in order to call a further witness. Mr Havenga (who appeared on behalf of the second defendant), strongly opposed the postponement application.
- [2] The matter before me is a claim for the restitution of land in terms of the Restitution of Land Rights Act No 22 of 1994. The claimants are Mr S J Monyeki (the first plaintiff) and his wife Mrs E M Monyeki (the second plaintiff). The claim is opposed by the registered owner of the land (as second defendant). The Regional Land Claims Commissioner (as first defendant) was represented at the hearing by counsel, Mr Motepe. Mr Motepe did not actively participate in the proceedings, but was present throughout.
- [3] The trial did not run smoothly. There were many postponements, for various reasons. Evidence was taken at a number of sittings over a considerable period. Closing arguments will be presented only on 15 August 2008.
- [4] After the plaintiffs called their witnesses, the following discussion took place between Mr Shakoane and the Court on 14 August 2007:

“Court Is that your case?”

Mr Shakoane We will provisionally close our case, Judge.

Court Just that we do not have a misunderstanding, unless something new happens, a new referral or whatever, it is a closure...

Mr Shakoane There is a likelihood I might call another witness or so, that is why I say we provisionally close our case.

Court No, but how can you provisionally close... the arrangement was that all your witnesses will be called today and we will limit this hearing to your witnesses because the Commissioner might make a further referral or a further report to which you would be entitled to respond, but if nothing else comes, there is no further referral, there is no additional report from the Commission, the you cannot again call a witness.

Mr Shakoane Well Judge, I am not sure if that is what...I just want to have the minute of that pre-trial discussion.

Court You can look at it.

Mr Shakoane And I do not think, with respect, that a party is bound to a closing of his or her case no matter what, which means that they may not ask to call a witness. There cannot be any prejudice particularly in so far as the other side have commenced with their case.

Court That is something else. If you close your case and later on you apply for leave to call a further witness, that application will be considered on its merits but this is a closure of your case subject to an application to call a further witness.

Mr Shakoane Correct.”

(pages 119 – 120)

[5] The second defendant (the land owner) thereupon presented evidence. The evidence included testimony by an expert on the analysis of aerial photography, Mr A Gerber. The second defendant’s evidence was concluded on 4 December 2007. Mr Motepe indicated that he might call two witnesses at the next hearing: Mr A Parker, an expert on the analysis and interpretation of aerial photography and an archaeologist. Proper notice of the first defendant’s intention to call Mr Parker, together with a summary of his evidence, was duly delivered. Neither a formal notice of intention to call an archaeologist nor a summary of his evidence was ever delivered.

[6] At that stage of the proceedings, the hearing was postponed to 25 January 2008. The following discussion then took place between counsel and the Court:

“Court The morning of 25?”

Mr Havenga Yes

Court Is that fine

Mr Havenga Would that also be argument?

Court Yes, that is for argument also. Yes, it is all outstanding matters.

Mr Matepe It will suit me as well my lord just for the record.

Court Mr Shakoane is that in order?

Mr Shakoane It is in order.

Court And it will then be – just to make sure it will be Mr Furstenberg, it will be Mr Mokwena if necessary on the limited issue only. It will be Mr Parker if the Commission decides to call him, together with Mr Gerber if necessary that is subject to the directive I have already given about adequate warning. It will be the geologist...(intervenes).

Mr Mathepe Archaeologist my lord.

Court Sorry archaeologist if the Commission decides to call him and if an application for leave to call him succeeds. And then lastly it will be argument. I think I should make another ruling about the archaeologist that any application to call him must also be made seven days in advance with a copy of his report?

Mr Mathepe So it has to be a written application?

Court It has to be a written application I think.

Mr Mathepe Yes.

Court With a copy of his report.

Mr Mathepe Yes.

Court The importance is a copy of his report.

Mr Mathepe Yes, of course.

Court Seven days in advance.”

(pages 58 – 59)

[7] In a letter from the State Attorney dated 15 January 2008, the following request was transmitted to the Registrar on behalf of the first defendant:

“It will be appreciated if you can convey the following to the Honourable Judge Gildenhuys:

The Regional Land Claims Commissioner: Limpopo will not be calling any expert witnesses.

We have, however made both our experts, Mr Parker and Mr Pelzer (Archaeologist) available to the claimants who have indicated that they would like to call Mr Parker on their behalf.”

The letter was copied to the plaintiff’s attorneys.

[8] At the resumed hearing on 25 January 2008, which was extended to 26 January 2008, further evidence was taken in accordance with the Court’s ruling of 4 December 2007. The plaintiffs asked for leave to call Mr Parker. The second defendant did not object, and he was called and gave evidence.

[9] At the conclusion of the evidence on 26 January 2008, Mr Shakoane asked for a postponement to enable him to call the archaeologist as a witness. No written application was made. No summary of his evidence was delivered, as required under Rule 49 of the Land Claims Court Rules. The archaeologist was not present to give evidence. The plaintiffs’ attorney was not in Court.

[10] The following discussion then took place between counsel and the Court:

“Mr Shakoane Sorry Judge we are going to request for leave to call the archaeologist as witness.

Court Ja, but why is he not here?

Mr Shakoane The report has been I think filed on – the attorney is not here, but my instructions are that the report has been filed and we...

(intervenes)

Court Is there a summary of evidence lodged with the Court?

Mr Shakoane Yes, their report.

Court But then why is he not here?

Mr Shakoane He is not here, because it was anticipated that the other side would have to consider the report and ... (intervenes).

Court No, you cannot anticipate that. The idea was that we will finish evidence yesterday and argue today, because of the lack of record we said we cannot argue, but we will finish today that was made very clear.

Mr Shakoane Referring to when, to the last hearing in December?

Court Yes, you said that we will use Thursday to finish evidence if there is a run over it can run over to a Friday, there was directions given for heads of argument for today and the parties were then telephoned that because the record is not available we will not argue, but we will finish the evidence.

Mr Shakoane Yes, but there was more to that in that I made enquiries with your registrar judge and the information I obtained was that in fact today the court was not going to be sitting.

Court No, no, no.

Mr Shakoane And that her Ladyship Judge Pienaar would have required to be released early and when I had a discussion also with my learned friend when he required from me about Mr Aslam Parker's report he indicated to me that the court was actually, if it sits today it is going to sit today for half a day.

Court But then ... (intervenes)

Mr Shakoane Then I requested that Mr Aslam Parker will have to come and testify today and on account of what I was being told the judge's registrar informed me that if that would become the case it may be that an application will have to be made yesterday for him to be called as a witness on the next day, upon which information a decision was taken to have him come yesterday.

Court Who is "him" the archaeologist?

Mr Shakoane No

Court Mr Parker yes

Mr Shakoane The photographic ... (intervenes)

Court That was done, my question is why was the archaeologist not present?

Mr Shakoane No, no I am still going to explain.

Court Yes

Mr Shakoane And then looking at all that which is coupled with the fact that I was informed by the archaeologist that he will be engaged somewhere in Nelspruit it only became fitting that one could not call him or succeed in getting him to come here to court today.

Court What about a subpoena that is very efficient?

Mr Shakoane I did not regard that, because normally if one's witness is willing and only ... (intervenes)

Court So you expect the court to stand the matter down because your expert witness is otherwise engaged?

Mr Shakoane No, not at all judge. Not at all I have indicated the facts and the reasons why today the expert, the archaeologist expert could not be here.

Court Yes, the reason is that he is engaged in Nelspruit that is what you have said.

Mr Shakoane No, I have given other reasons as well.

Court No, you assumed that we will not be sitting the full day if you made that kind of assumption, you raise it in court. We hope to finish this morning you are quite right here.

Mr Shakoane Yes

Court But that does not mean you can assume that your witness need not to be there, because we will not reach him. If you want to make that assumption you must address the court and say there is another witness I would like to call, can he be excused or must he be there and they would have told you immediately he must be here today.

Mr Shakoane No, I very much appreciate that Judge, but the information I am placing before the court is what attempts were made in respect of one of the witnesses who were to testify and what response I got from this court and in every likelihood from the responses I received including further yesterday's indication by the court that today it can only sit up to 1 o'clock.

Court I did not tell you we can only sit until 1 o'clock and nor did you raise it.

Mr Shakoane Judge but that was that was discussed in your chambers at the Magistrate's Court at Modimolle.

Court No. I said we had a Judges' meeting at 2.

Mr Shakoane Yes.

Court But that does not mean I am going to adjourn the court, court sittings get preference over Judges' meetings. I never said we cannot sit ... (intervenes)

Mr Shakoane I did not get that understanding the understanding I got was that we can only sit up to 1 o'clock. I am sorry about that if that was the message then I would have made different attempts, but not a subpoena that is not something that I thought of because he is a willing witness, it is only that he also had these commitments he phoned me about, but otherwise I would have made attempts, which would be placed here before the court.

Court I was throughout under the impression that it was only Mr Parker.

Mr Shakoane I apologise for that Judge.

Court Alright.

Mr Shakoane The other point is that unfortunately the attorney is not here, he gave me the information that he has filed a report plus a notice.

Court Again it might not have found its way to my papers, but I have not seen it.

Mr Shakoane I believe so. I believe so.

Court And my colleague and the registrar say that has not been filed.

Mr Shakoane Well then ... (intervenes).

[Talking simultaneously].

Mr Shakoane I will have to enquire from him, because ... (intervenes).

Court But will you do so?

Mr Shakoane The unfortunate thing is that he is not here, but I would have had to enquire ... (intervenes).

Court Ja, but you had – how can your attorney be absent in a big case like this?

Mr Shakoane I am unable to answer that judge, because yesterday he informed me he will be here, although he said he had something he had to first clear at the Magistrate's Court in Polokwane and then he will be here, but I do not know why he did not come.

Court

But under the rules you have got to give timeous notice.

Mr Shakoane Indeed.

Court And you have known about this archaeologist a long time.

Mr Shakoane No that is so judge. If you remember this topic was touched on the last appearance in December.

Court Yes.

Mr Shakoane And the difficulty, which arose from the situation where the attorney for the landowner refused to allow access during December was also placed on record, and which is the reason why they could only make a visit this January to the land and then try to prepare the report.

Court But why couldn't a report have been made available for today?

Mr Shakoane That is exactly why I expressed my surprise judge, because the report is there and the attorney informed me that he has filed it with a notice, but I do not know, I cannot explain ... (intervenes).

[Talking simultaneously.]

Mr Shakoane I cannot explain why it is not in the court file.

Court Ja.

Mr Shakoane There could be a reason, once I have got his explanation.

Court I will check the front office. Mr Havenga what is your view?

Mr Havenga Until minutes ago there was never any mention of a further witness. May I remind you that in the hearing in Polokwane already the plaintiffs have closed their case.

Mr Havenga We reminded them then at that stage if they want to reopen their case and call any further witnesses that there has to be a formal

application to do that. The State intended to call an expert witness and we got notice of that that is Mr Parker here. The State never gave notice of calling an archaeologist although ... (intervenes).

Court You received not notice?

Mr Havenga Although the archaeologist was instructed by the State to do the investigation regarding the extension of the claim. We were told by the State's representatives that they do not intend to call any of those 2 witnesses, because in their opinion they did not contribute to the case. The witness Mr Parker was then made available to the plaintiffs, who have not insisted on opening, formal re-opening of their case in view of the fact that we did receive a timeous notice that he is going to be called and a summary of his witness.

I said timeous but it was a day or so late, we did not take that technical point, but there was no indication at any stage that the plaintiffs intended to call a further witness. We are not going to allow that, we object strongly to any attempt to re-open the case at this late stage without notice. We have already lost at least 1 court day because the plaintiff's legal representatives without an excuse did not attend court in Nylstroom the first time and we had to reconvene there especially for the purpose of giving them an opportunity to cross-examine. This case has been costing the landowner a lot of money, the plaintiff is sponsored by the State, we do not receive any contribution and we simply do not – we object to any further postponement of the case at his

insistence of the plaintiffs.

Court Any reply to that?

Mr Shakoane Judge it is correct that I won't respond to the other statement being made, they are totally irrelevant and uncalled for. It is correct the claimants are sponsored by the State and that is one the reasons why there is a delay in having commissioned the archaeologist to prepare the report on behalf of the plaintiff. A request had first to be directed to the Commission and permission was not given to the claimants' legal representatives themselves to take to the claimants' legal representatives themselves to take the lead in commissioning the archaeologist to prepare the report.

The Commissioner's office with the head office themselves said they would do it, because they will be paying for the report and the services of the archaeologist. Then round about the end of November that is when the attorney for the claimant was then informed that the archaeologist has – services have now been secured and that he will have to go and do inspections at the Indabushi at the farm. A letter was then directed to the attorney for the landowner to say please give us access round about, I believe it was the 26th or the 25th of November I am under correction.

In response the landowner's attorney refused access for the inspection and this aspect was relayed to the court at the last

hearing in December and that then resulted in the legal representatives for the claimant reverting back to the Commission and the Commission said they will then take the initiative to ask for the access to the land and to enable the archaeologist to go and do the inspection, which is something that occurred, the process was taken through the State Attorney's office and then access was allowed for the 3rd of January of this year.

Court Access on the 3rd of January.

Mr Shakoane Yes and thereafter a report had to then be prepared by the archaeologist and which I say has now been prepared and it came, I believe via the State Attorney's office and the attorney informed me that he has prepared the notice, because the notice, expert notice, because he was thereafter informed by the State Attorney's office that the Commissioner no longer intends to call either the photograph expert or the archaeologist as witnesses.

And for that reason then the initiative or the notice had to come from claimant's attorney's record, I mean offices.

Court But yesterday we were all very clearly under the impression that it is only Mr Parker today.

Mr Shakoane I apologise for that wrong impression that it is only Mr Parker today.

Court I just want to discuss the matter with my colleagues and see whether there is anything in the main court file, any report. I will take about a 5, 6 minute adjournment and then ...
(ntervenes)

Mr Shakoane As the court pleases.

Court And then make my decision.

Mr Shakoane As the court pleases.”

(pages 53 – 61)

[11] After the discussion, I checked with the registrar whether she received any notice of intention to call the archaeologist or a summary of his evidence. She had nothing on file. If Mr Shakoane was in possession of copies (which I doubt), he did not hand them up. The Court thereupon gave the following decision:

“Court This matter has previously been postponed to Thursday 25 January 2008 and Friday 26 January 2008. Today is Friday 26 January 2008 and it is now shortly before the lunch adjournment. When the matter postponed I ruled that evidence, which was then outstanding would be taken on Thursday 25 January and that argument would be presented on Friday 26 January.

Due to the fact that the record of some of the previous hearings have not been available counsel was informed by my Registrar that the matter will no longer be argued on Friday 26 January, but that the case will nevertheless proceed on Thursday 25 and Friday 26 January 2008 to take the last of the evidence.

The claimants presented their evidence first thereafter Mr Shakoane provisionally closed the plaintiffs’ case. The landowners then presented evidence.

The claimants delivered a notice some time before Thursday 25 January 2008 that at the resumed hearing expert evidence will be tendered by Mr Parker. The landowners had no objection and his evidence was taken. There was no notice that the claimants wanted to or intended to present any other evidence. It was not raised yesterday. In fact, it was raised for the first time in court after Mr Parker concluded his evidence and Mr Shakoane was asked whether he is now finally closing his case. He then asked for a postponement to enable the claimants to call an archaeologist.

No previous notice has been given that the claimants intend to lead the evidence, nor has a summary of the evidence been submitted. There is not application to re-open the claimants’ case. The expert witness, the archaeologist is not in court today. I was informed that he is busy elsewhere in Nelspruit. The claimants’ attorney is also not in court. Mr Shakoane said he was given to understand that the necessary expert notice was delivered, but that is not the case. I have checked the court records. There is no such notice.

The attorneys for the landowner also informed me that they received no such notice. Since the attorney is not in court to give an explanation, we do not know what the position is with the notice. Mr Havenga for the landowners objected strongly against a further postponement.

This case has been postponed many times at great cost to all the parties. In my view and my colleagues agree with me that a proper case for a postponement has not been made out and a postponement is refused. The case will stand down for the presentation of argument, but not for the presentation of further evidence.

Court Then Mr Shakoane then that is the end of your case at the moment.

Mr Shakoane Yes, in fact I anticipated we would be given an opportunity to address the court when it resumed.

Court No, I asked you to put your case, which you did. I then asked Mr Havenga for his comments, I then asked you whether you have any reply I then said that we will adjourn to consider our decision and we did.

Mr Shakoane I understood it was for checking the court's file ... (intervenes).

Court And to ... (intervenes).

Mr Shakoane And if the documents that have been filed have been filed.

Court No.

Mr Shakoane But I just mention it by the way it pleases the court.

Mr Havenga As it pleases the court."

(pages 62 – 64)

[12] Before considering whether the decision to refuse a postponement (which, if granted, would have had the effect of re-opening the plaintiff's case) is appealable at all, I will shortly consider the prospects of success on the merits. There was no formal application for re-opening the plaintiff's case and no formal application for a postponement. The Court has specifically directed on 4 December 2007 that if the first defendant intended to call an archaeologist, a formal application to call him must be made seven days in advance of the hearing date and a copy of his report must be submitted. The plaintiffs could therefore not have been under the impression that they would be allowed to call an archaeologist without the need to make a similar application.

[13] When the application for leave to appeal was argued, there was still no summary of the evidence of the archaeologist which the plaintiff sought to present. We could therefore not determine to what extent (if at all) the evidence would be relevant to the issues before the court. Mr Havega submitted that it is difficult to see how an archaeologist could make any contribution to the present case. The claim is not a claim by a community. It was lodged by the two plaintiffs individually. The disputes, so Mr Havenga submitted, are limited.

[14] In my view, even if my decision to refuse a postponement was appealable, an appeal against the decision will have no reasonable prospects of success. If the decision is not appealable at all, *cadit quaestio*. I proceed to consider whether or not it is appealable.

- [15] One of the jurisdictional requirements for an appeal from this Court to the Supreme Court of Appeal is that the decision appealed against must be a “judgment or order” within the meaning of those words in section 37 of the Restitution of Land Rights Act. The question when a court decision is an appealable “judgment or order” has been the subject of many judgments over the years. In the case of *Zweni v Minister of Law and Order* 1993 (1) SA 523, Harms JA listed some of the general propositions. The following are relevant to the dispute before us.

“For different reasons it was felt down the ages that decisions of a ‘preparatory or procedural character’ ought not to be appealable ... “ (at 531I)

“... as a general rule, piecemeal consideration of cases is discouraged. The importance of this factor has somewhat diminished in recent times. ... The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution ...” (at 531J – 532B)

“The expression ‘judgment or order’ ... has a special, almost technical meaning; all decisions given in the course of the resolution of a dispute between litigants are not ‘judgments or orders.’” (at 532C)

“In determining the nature and effect of a judicial pronouncement, not merely the form of the order must be considered but also, and predominantly, its effect ...” (at 532H-I)

“A ‘judgment or order’ is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings...” (at 532J – 533A)

“The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability ... To illustrate: the exclusion of certain evidence may hamper a party in proving his case. That party may notionally be able to prove it by adducing other evidence. In that event an incorrect exclusion would not necessarily have an effect on the final result. In deciding upon the admissibility of evidence a court is not called upon to speculate upon or divine (with or without the assistance of the parties) the ultimate effect of its decision on the course of the litigation. Should it appear at the conclusion of the matter that an incorrect ruling amounted to an irregularity which may have had a material effect on its outcome, the Court of appeal may, in adjudicating the ‘merits’, set aside the final judgment on that ground and, in an appropriate case, remit it back to the trial Court...” (at 533B-E)

- [16] Harms J reached the following conclusion in the *Zweni* case (*supra*, at 536A-C):

“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.”

[17] Howie P, in *Phillips v National Director of Public Prosecutions* 2003

(6) SA 447 (SCA), distilled these requirements into the following dictum (at 452G – 453A):

“Generally speaking, a judgment or order is –

1. Final in effect, “final” meaning unalterable by the court whose judgment or order it is.
2. Definitive of the rights of the parties in that it grants definitive and distinct relief.
3. Dispositive of at least a substantial portion of the relief claimed in the main proceedings.

Clearly, if the decision in issue has none of those attributes it is difficult (one need put it no higher) to see how it could be susceptible of appeal. But what if it has one or some but not all? The answer, apart from the fact that the Zweni formulation itself contains the qualification “generally speaking”, is that this Court has held that the formulation is illustrative, not immutable, and that a decision having final jurisdictional effect can be appealed against even if it is not definitive or dispositive in the sense meant in Zweni.”

[18] In *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA

921 (A), Wessels JA said the following (at 928G-H):

“By a parity of reasoning, the order of the Court a quo granting leave to plaintiff to re-open its case is not an interlocutory order within the meaning of s 20(2) (b) of the Act. The grant or refusal of the application was a matter within the discretion of the Court a quo and amounted to no more than a ruling made during the progress of the case. The grant of the leave provided no final relief to plaintiff on any matter in issue between the parties. It did not result in any prejudice to the defendant. If the argument of defendant’s

counsel were to be upheld it could result in a situation where virtually every order or ruling made during the course of a case

would, with the leave of the Court, be appealable. This would indeed open the door to the “fractional disposal” of actions and the “piecemeal hearing of appeals”.

Although in this case the application for the re-opening was granted by the Court a quo, the reasoning of the Court as expressed in the judgment of Wessels JA makes it clear that both the granting and the refusal of an application for re-opening is no more than a ruling.

[19] In the case of *Friday t/a Pride Paving v Rubin* 1992 (3) SA 542 (C) the defendant, at the commencement of the trial, brought a substantive application for the postponement of the trial on the grounds of his ill-health. The postponement was refused. The defendant then applied for leave to appeal. Conradie J (as he then

was) held that the refusal to grant the postponement was a ruling and as such not appealable. He said (at 547H-I):

“Generally speaking, the kind of order which the Court would not wish to see taken on appeal is the decision which is purely interlocutory in the Court a quo and which would, if it were reversed or altered on appeal, remain purely interlocutory in its effect. This, to my way of thinking, is the essence of a ruling.”

[20] Applying this test, Conradie J found (at 549B) that:

“it is plain that the refusal of a postponement, even if it were on appeal to be changed to the grant of a postponement, would not serve to advance the resolution of the main dispute between the parties.”

The learned judge added (at 548I) that in cases such as this, an appeal would be “wasteful and pointless”.

[21] On the authorities quoted above, I must conclude that the decisions we took, namely the refusal of the application for a postponement and, with it, the refusal of leave to re-open the plaintiff’s case, are not appealable judgments or orders. The outcome of an appeal will not dispose of a substantial portion of the relief claimed by the plaintiffs, nor will it have a final or definitive effect. An appeal at this stage of the proceedings can only lead to a piecemeal consideration of the case. Should it be subsequently found, in an appeal brought after final judgment had been given, that this Court erred in refusing a postponement and the re-opening of the plaintiff’s case, the Court of Appeal may set the final judgment aside on that ground and remit the case back to this Court for the hearing of further evidence. See *Zweni v Minister of Law and Order* (supra) at 533D-E, quoted in paragraph [14] of this judgment. Such a course was followed in the case of *Coopers (SA) Ltd v Deutsche Schädlingsbekämpfung MbH*, 1976 (3) SA 352 (A), where the judgment and orders of the Court of first instance were set aside and the matter was remitted to it for further hearing of the defendant’s defence.

[22] I come to the issue of costs. The plaintiffs were made well aware that they were not, as of right, entitled to call further witnesses in the absence of-

A formal application for the re-opening of their case; and

A summary of the further evidence to be tendered.

None of this was complied with. Furthermore, legal research by the plaintiffs’ legal advisors would have made it apparent to them that the decision against which the plaintiffs seek leave to appeal, might not be appealable at all. Mr Shakoane failed to address the issue of appealability in his heads of argument.

[23] This case has been dragging on for a long time, at great expense for the second defendant. The plaintiffs are sponsored by the State. A special date had to be set for hearing the application for leave to appeal. The application has no merits at all. The second defendant is, in my view, fully justified to ask for a cost order against the plaintiffs. This is a matter where the usual practice of the Court not to make cost orders, ought not to be followed.

[24] For the reasons set out above, the following order is hereby made:

The application for leave to appeal is dismissed; and

The plaintiffs jointly and severally, the one paying the other to be absolved, are ordered to pay the second defendant's costs.

A Gildenhuys

Judge of the Land Claims Court

I agree

J Pienaar

Acting Judge of the Land Claims Court

Appearances:

For the plaintiffs:

Mr G Shakoane

with him

Mr M Malowa

instructed by

Nkuzi Land Rights Legal Unit

For the first defendant:

Mr J A Motepe

The State Attorney, Pretoria

For the second defendant:

Mr H S Havenga SC

Grütter & Grobbelaar Attorneys

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