CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 61/13
[2013] ZACC 47

In the matter between:

DIRECTOR-GENERAL DEPARTMENT OF HOME AFFAIRS — First Applicant

MINISTER OF HOME AFFAIRS — Second Applicant

and

VIOLETTA MUKHAMADIVA — Respondent

Decided on : 12 December 2013

JUDGMENT

MOSENEKE DCJ (Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This case concerns whether the Western Cape High Court, Cape Town (High Court), having found that nobody was guilty of contempt of court arising from the

failure to comply with its order, could still direct one of the parties to provide it with a report to be examined by the High Court with a view to giving an advisory opinion.

[2] The matter comes before this Court as an application for leave to appeal, following the refusal to grant leave by the Supreme Court of Appeal. The first applicant is the Director-General in the Department of Home Affairs (Director-General). The second applicant is the Minister of Home Affairs (Minister). They cite as the respondent, Ms Violetta Mukhamadiva, a national of Uzbekistan, who was refused entry into the Republic of South Africa on 6 November 2011. She did not participate in the proceedings before this Court and as a result no opposing papers were filed. Accordingly, this matter must be determined with reference to the papers filed by the applicants and the written argument lodged by their counsel and counsel acting at this Court's request.

[3] In view of the fact that the respondent did not participate in these proceedings, this Court sought assistance from counsel who represented her in the High Court. We are grateful to all counsel for the helpful written argument. As the Rules stipulates, this application was determined without the hearing of oral argument.[1]

[1] Rule 19(6) of the Rules of this Court provides:

> "(a) The Court shall decide whether or not to grant the appellant leave to appeal.
>
> (b) Applications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself.
>
> (c) The Court may order that the application for leave to appeal be set down for argument and direct that the written argument of the parties deal not only with the question whether the application for leave to appeal should be granted, but also with the merits of the dispute. The provisions of Rule 20 shall, with necessary modifications, apply to the procedure to be followed in such procedures."

Factual background

[4] On Sunday 6 November 2011, Ms Mukhamadiva arrived at Cape Town International Airport, on board a Turkish Airlines flight. She was refused entry into South Africa by Mr Grobler, an immigration officer in the Department of Home Affairs (Department). Aggrieved by this decision, she launched an application in the High Court, on an urgent basis.

[5] The High Court issued an order in the following terms:

> "1. That [the Director-General and Minister] shall appear before this Court at 10h00 on Monday 7 November 2011 together with [Ms Mukhamadiva] in order to show cause why [Ms Mukhamadiva] should not be permitted to enter the Republic of South Africa on appropriate conditions.
>
> 2. That [the Director-General and Minister of Home Affairs] permit [Ms Mukhamadiva] to consult with her legal representatives immediately.
>
> 3. Costs shall stand over for later determination."

[6] But before this order could be executed at the airport, Ms Mukhamadiva returned to her country of origin. Flowing from her departure, the application she had instituted against the Director-General and the Minister was not pursued further. The proceedings took a turn in the direction of an inquiry into whether officials in the Department were guilty of contempt of court. This arose from the fact that Ms Mukhamadiva had been returned to her country of origin despite the court order.

[7] It is apparent from the papers that airline companies, on whose flights passengers come into South Africa, are responsible for returning passengers to where

they came from in the event of them being refused entry into the country. This is what happened here. When Ms Mukhamadiva was not admitted into South Africa, Turkish Airlines had to take her back to Uzbekistan. At the time she boarded the return flight, none of the parties was aware of the court order issued by the High Court. That order reached the relevant officials at Cape Town International Airport after her departure.

[8] The High Court, of its own accord, investigated the circumstances that led to the order failing to achieve its objective. It summoned Mr Grobler to appear before it on 21 November 2011. He was required to show cause why he should not be committed for contempt of court for failing to implement the order in question. Ms Mukhamadiva's attorneys and Mr Grobler testified at the hearing on 21 November 2011.

[9] In an *ex tempore* judgment,[2] the High Court found that Mr Grobler was not guilty of contempt of court. Since Ms Mukhamadiva was no longer pursuing the application and the contempt of court enquiry had been concluded, ordinarily the matter should have been put to rest. But the High Court issued a further order directing the Head of Immigration in the Western Cape to file a report in which the following issues were to be addressed:

(a) the procedures adopted by departmental officials when served with a court order in a case of urgency; and

[2] A judgment given at the conclusion of the hearing without the judgment being reserved.

(b) whether a plan has been adopted or will be adopted to educate immigration officials in compliance with court orders.

[10] The order that required a report to be filed was issued by the High Court, acting on its own initiative. Indeed the report was furnished to the Court, setting out the procedures followed in executing a court order. Importantly, the report recorded that there is a cluster of agencies operating at Cape Town International Airport that includes officials from the Department. Each of these agencies has a separate role to play. The report pointed out, among other things, that access to the international transit zone is exercised by Border Police for security reasons and that departmental officials are not allowed entry into that area without security clearance. This generally means that, if a court order has to be executed in the international transit zone, only members of the Border Police may implement the order.

[11] The High Court was not happy with parts of this report, which it interpreted as saying that our Constitution and laws did not apply to some areas of the Cape Town International Airport. The High Court addressed a letter to the parties' counsel, asking them to file argument on a specific hypothetical question posed by the Court against the understanding that it is only members of the Border Police and persons with security clearance who may enter the international transit zone. The High Court formulated the hypothetical question in these terms:

> "The question that I wish to have addressed, particularly with reference to the International Civil Aviation Organisation, is how a court order could be enforced in the following circumstances. Assume a parent of a toddler approached the court as a

> matter of urgency to prevent her ex-husband from secreting her child out of the country. An order is granted on an interim basis that is subject to a rule nisi on a 24 hour date of return. How could such a court order be implemented in light of the discussions in which I have made reference concerning the [Convention on International Civil Aviation]?"

[12] This court-driven enquiry into hypothetical issues escalated into a formal hearing on 19 March 2012. At the request of the High Court, counsel for the parties were asked to file written argument before that date. On 19 March 2012, oral argument was presented to the High Court on its hypothetical question.

[13] On 23 October 2012, the High Court delivered a judgment[3] on the hypothetical issue. But in its judgment the Court also criticised the report filed by the Head of Immigration. The Court found, incorrectly, that the report suggested that "territorial laws of a country do not apply in certain parts of the airport".[4] The Court held that the Convention on International Civil Aviation does not provide so. In relevant part the judgment reads:

> "[The report] . . . is manifestly flawed. It cannot, either under international law nor under the Constitution, justify the approach to the enforcement of court orders that [the Head of Immigration] outlined therein. There is case law which dictates that the exact opposite approach should be adopted. Were [the Head of Immigration's] approach to be followed, it would mean that many orders of our courts given on an urgent basis, and dealing for example, with the abduction of children or other forms of criminal activity would be stymied by the Department of Home Affairs which it must be emphasised is not above the law."[5]

[3] *Mukhamadiva v Director-General Department of Home Affairs and Another* [2012] ZAWCHC 337 (High Court judgment).

[4] Id at para 9.

[5] Id at para 20.

[14] The judgment does not make a specific order. Instead, it concludes by stating:

> "For these reasons this judgment will be made available to both respondents with the objective that an adequate policy reflecting the Department's commitment to the Constitution and the rule of law be followed in the future. It will also be made available to the South African Human Rights Commission with a view to ensuring that it assists the Department, if necessary, and helps promote the Department's respect for the rule of law, within the specific context of this kind of case."[6]

[15] On 15 November 2012, the applicants sought leave to appeal against the order from the High Court. In a judgment delivered on 3 January 2013, the High Court refused leave. The Court reasoned that, because its judgment contained no order and amounted to nothing more than an advisory opinion, it was not appealable. The Court also held that there was no merit in the grounds of appeal. A petition to the Supreme Court of Appeal was dismissed on 24 April 2013, hence the present application.

[16] In my judgement, leave to appeal should be refused because:

(a) the "order" of the High Court is not appealable;

(b) there is no live issue between any of the parties;

(c) any order made by this Court will have no practical effect; and

(d) there are no compelling factors that nonetheless make it in the interests of justice to hear the appeal.

[6] Id at para 21.

Is the High Court order appealable?

[17] Our courts have had many occasions to express themselves on when an order of court is appealable.[7] For instance, in *Ntshwaqela* it was stated:

> "When a judgment has been delivered in Court, whether in writing or orally, the Registrar draws up a formal order of Court which is embodied in a separate document signed by him. It is a copy of this which is served by the Sheriff. There can be an appeal only against the substantive order made by a court, not against the reasons for judgment."[8]

[18] In *Von Abo* the Court stated:

> "Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed".[9]

[19] The following similar considerations are set out in *Zweni*:[10] the judgment must be final in effect and not open to change by a court of first instance; it must be definitive of the rights of the parties; and it must dispose of a substantial portion of the relief sought in the main proceedings.

[20] The applicants contend that the High Court made "an operative injunctive order", which is appealable. They submit that it amounts to an order, the character of

[7] See, for example, *Health Professions Council of South Africa v Emergency Medical Supplies and Training CC t/a EMS* [2013] ZASCA 87; 2010 (6) SA 469 (SCA) and *Constantia Insurance Co v Nohamba* 1986 (3) SA 27 (A).

[8] *Administrator, Cape and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) (*Ntshwaqela*) at 715D.

[9] *Government of the Republic of South Africa and Others v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA) (*Von Abo*) at para 17.

[10] *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532I-533A.

which is "a structural or quasi-structural interdict". They submit that to ascertain the purpose and intention of an order, it needs to be considered in the light of the judgment as a whole to fully grasp the reach and effect of the order.[11]

[21] In making this submission, the applicants seem to disregard the judgment of the High Court dismissing their application for leave to appeal. In it, the High Court stated that—

> "[the judgment] did not decide a live dispute between the parties, nor did it order the [applicants] to do or refrain from doing anything. . . .[I]t merely comments on the approach followed by the Department . . . without making any binding findings about the illegality of any policies . . . or conduct".[12]

[22] It is quite telling that the respondent in the High Court is not part of this application for leave to appeal. Thus the application is unopposed. This is hardly surprising. There is no residual dispute between the applicants and Ms Mukhamadiva. As a result, the Court requested the Cape Bar Council to recommend counsel to assist it in coming to a proper decision.

[23] Counsel appointed by the Court submitted that the High Court judgment is not appealable. He referred to the Supreme Court of Appeal decision of *Von Abo*[13] where the principles relevant in determining whether an order is appealable were set out.[14]

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[11] For this proposition the applicants relied on *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*) at para 71.

[12] High Court judgment dismissing the application for leave to appeal at 5.

[13] *Von Abo* above n 9.

[14] Id at para 17.

Counsel also referred to *ITAC* where it was also observed that, ordinarily when a court considers an application for leave to appeal, its reasons to grant or refuse leave often serve as additional reasons for the original order. The additional reasons sometimes clarify the ambit and effect of the original order.[15] Here too, the High Court's judgment dismissing the application for leave to appeal, which the applicants seem not to place much weight on, is important to the question of appealability. It discloses the purpose and ambit of the "order".

[24] The application for leave to appeal setting aside what the applicants call an order of the High Court must fail. The judgment made no specific order, and simply reflected on the report and legal position surrounding the enforcement of court orders in international airports. There was no basis upon which the applicants could appeal the judgment of the High Court. The High Court wrote a judgment in response to the report the Director-General had furnished and the submissions made by the parties on the hypothetical question it had put to them. The stated objective of the judgment was to assist the Director-General in formulating a policy that complied with the Constitution and the rule of law in the enforcement of court orders. At best, the judgment proffered by the High Court was advisory in nature. This is clear from the High Court's subsequent judgment dismissing the application for leave to appeal. Further, there is no merit in the applicant's contention that the judgment of the High Court amounts to an operative injunctive order. As is plain from paragraph 21 of its judgment, that Court did not order anybody to do anything.

[15] *ITAC* above n 11 at para 71.

[25] Besides the insurmountable difficulty facing the applicants in seeking to appeal against the reasons in a judgment and not against an order of the High Court, no order susceptible to an appeal was made. This conclusion alone is dispositive of the application for leave to appeal. I nonetheless consider it expedient to explore the other elements that go to the interests of justice.

Is there a live dispute?

[26] In applying for leave to appeal in the High Court, the applicants contended that that Court had no jurisdiction to continue to enquire into the departmental policies after Ms Mukhamadiva had left the country and Mr Grobler had been acquitted on a charge of contempt of court. Persisting with the argument, the applicants submitted that, with the acquittal of Mr Grobler, the matter should have been taken to have been finalised as there was no further dispute between the parties. Invoking the principle that once a court has pronounced a final judgment it becomes *functus officio*, the applicants contended that, because the High Court had finally exercised its jurisdiction over the case, its authority over it had ceased.

[27] The applicants question whether in the specific circumstances of this case the High Court, having finally exercised its jurisdiction on the matter and acquitted Mr Grobler on a charge of contempt of court, had authority to enquire into the policies of the Department.

[28] It is a fundamental principle of our law that, once a court has finally pronounced its judgment on a case, its authority over that case ceases.[16] This accords with the principle of finality in litigation, a basic principle of our law. This principle applies with equal force to constitutional litigation.[17] The High Court erred in its reliance on section 172(1)(b) of the Constitution for the proposition that a court may require government departments to file reports in the circumstances that occurred in this case. Section 172(1)(b) does not change the position.[18] On the contrary section 172(1) fortifies this principle.

[29] The section obliges courts when deciding a constitutional matter to declare conduct or law inconsistent with the Constitution invalid. Section 172(1)(b) in particular empowers a court to make any order that is just and equitable, including an order suspending the declaration of invalidity or limiting the retrospective effect of the declaration of invalidity. Implicit in this provision is the fact that the order granted must be just and equitable to the parties to the litigation. The remedial power in section 172 is exercised when resolving a live dispute between protagonist parties in litigation.

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[16] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A); *Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499; and *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173.

[17] Ex parte *Minister of Social Development and Others* [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC) at para 50.

[18] Section 172(1) provides:

> "When deciding a constitutional matter within its power, a court—
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make any order that is just and equitable, including—
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[30] The section does not authorise any court to reopen a case once it has been finalised. Barring well-defined special circumstances, our courts have no power to pronounce on issues once a final judgment is given. Those circumstances are not present here. The principle of finality in litigation is of importance in constitutional cases as well. It is not permissible to have litigation in a particular case extended beyond the final judgment, except where a structural interdict has been issued.

[31] What is more, the High Court here did not reconsider an earlier order. Rather, it adopted a different course altogether after finalising the contempt of court enquiry. It proceeded to enquire into the constitutionality of the Department's policies as set out in the report. The filing of this report in turn was not required, to monitor progress made in resolving any live dispute. The circumstances in which the report was asked for by the High Court were unusual.

[32] It was not competent for the High Court, in the present circumstances where no live dispute existed between the parties, to issue an order requiring a report; raise a hypothetical question and direct the parties to present argument; and deliver a judgment that was intended to be an advisory opinion. And it would not be appropriate for this Court to decide a matter where no dispute exists.

Will any order made by this Court have a practical effect?

[33] Long before our constitutional dispensation, the principle has always been clear: courts should not decide matters that are abstract or academic and which do not have any practical effect either on the parties before the court or the public at large. In *Geldenhuys*[19] Innes CJ stated, in the context of the granting of declaratory orders where no rights have been infringed, that courts of law exist to settle concrete controversies and actual infringements of rights, and not to pronounce upon abstract questions, or give advice on differing contentions.[20]

[34] This principle, which is fundamental in the conception of the function of the court,[21] was confirmed in subsequent cases of the Appellate Division.[22] In *Graaff-Reinet Municipality* Watermeyer CJ found that though this principle originated as a rule of practice, it has since crystallised into a rule of law.[23] And in *Flats Milling Co* the Court again highlighted the principle that courts do not normally decide academic questions of law,[24] and stressed the need for the pronouncement made by the Court not to be an academic decision but an operative decision that has a practical effect on persons before it.[25]

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[19] *Geldenhuys and Neethling v Beuthin* 1918 AD 426 (*Geldenhuys*).

[20] Id at 441.

[21] Ex parte *Ginsberg* 1936 TPD 155 at 157-8.

[22] *Attorney-General, Transvaal v Flats Milling Co (Pty) Ltd and Others* 1958 (3) SA 360 (A) (*Flats Milling Co*) and *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A).

[23] *Graaf-Reinet Municipality* id at 424.

[24] *Flats Milling Co* above n 22 at 372. See also *R v Singh* 1944 AD 366.

[25] *Flats Milling Co* above note 22 at 374.

[35] In *Premier van die Provinsie van Mpumalanga*[26] Olivier JA, after discussing the rationale behind section 21A of the Supreme Courts Act,[27] laid down the importance of avoiding vague concepts such as "abstract", "academic" and "hypothetical" as yardsticks for the exercise of an appeal court's jurisdiction to hear an appeal. The question is a positive one, whether a judgment or order of the court will have a practical effect and not whether it will be of importance for a hypothetical future case.[28]

[36] Following on earlier judicial statements, in *JT Publishing*[29] Didcott J wrote, in the context of declaration orders, that the well-established and uniformly observed policy directs courts not to exercise their discretion in favour of deciding issues that are merely abstract, academic or hypothetical.[30] He added that this Court would not

[26] *Premier van die Provinsie van Mpumalanga v Stadsraad van Groblersdal* [1998] ZASCA 20; 1998 (2) SA 1136 (SCA).

[27] The principles set out above were initially legislated in the General Law Third Amendment Act 129 of 1993, which inserted section 21A into the Supreme Courts Act 59 of 1959. This was then substituted by the Judicial Matters Amendment Act 104 of 1996. Section 21A(1) provided:

> "When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

The Supreme Court Act has since been repealed and replaced by the Superior Courts Act 10 of 2013 which provides in section 16(2)(a)(i):

> "When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

[28] *Premier van die Provinsie van Mpumalanga* above n 26 at 1141. See also *President of the Ordinary Court Martial and Others v The Freedom of Expression Institute and Others* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) (*President of the Ordinary Court Martial*) at para 13-4and *Simon NO v Air Operations of Europe AB and Others* [1998] ZASCA 79; 1999 (1) SA 217 (SCA) at 226.

[29] *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) (*JT Publishing*) at 525A-F.

[30] Id at 525B. This principle was accepted with the necessary caveat that it could be departed from in special circumstances after taking into account certain relevant factors.

be obliged to determine an issue which, because of its abstract, academic or hypothetical nature, once determined would produce no concrete or tangible result.[31]

[37] The position as set out in *JT Publishing* was confirmed and developed by this Court in subsequent judgments.[32] In *President of the Ordinary Court Martial* this principle was accepted and extended to confirmation proceedings brought in terms of section 172(2) of the Constitution. Again, the Court was enjoined, in exercising its powers, to consider whether any order it made would have a practical effect on the parties before it or on others.[33] And in *National Coalition* the Court noted that a matter is moot and not justiciable if it no longer presents an existing or live controversy.[34]

[38] The High Court did not take heed of these salutary judicial pronouncements. Once the contempt of court proceedings had been concluded no further issues remained to be determined. The actions of the High Court overstepped the bounds of what it was called upon to decide and were superfluous.

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[31] Id.

[32] See *Wiese v Government Employees Pension Fund and Others* [2012] ZACC 5; 2012 (6) BCLR 599 (CC) at para 22; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 21; *President of the Ordinary Court Martial* above n 28 at paras 13-8; and *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 51 and 54.

[33] *President of the Ordinary Court Martial* above n 28 at paras 13-8.

[34] *National Coalition* above n 32 at para 21.

[39] It follows without more that the order we would make, if we were to hear the appeal, would not resolve a live dispute and will have no practical or useful consequence. It would amount to a dissipation of scarce judicial resources.

Any other compelling factors?

[40] The fact that a matter may be moot in relation to the parties before the Court is not an absolute bar to the Court considering it. The Court retains discretion, and in exercising that discretion it must act according to what is required by the interests of justice.[35] And what is required for the exercise of this discretion is that any order made by the Court has practical effect either on the parties or others. Other relevant factors that could be considered include: the nature and extent of the practical effect the order may have; the importance of the issue; and the fullness of the argument advanced.[36] Another compelling factor could be the public importance of an otherwise moot issue.

[41] This Court invited the applicants and the counsel appointed by the Court to make submissions whether there are any other factors indicating that it is in the interests of justice for the Court to entertain the appeal. Both took the view, albeit for divergent reasons, that this Court should hear the appeal. Counsel appointed by the Court submitted that the appeal should be heard because it would demonstrate that "Davis J was correct to be seriously concerned about the ability and willingness of the

[35] *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 231 (CC); *Radio Pretoria v Chairman of the Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC); and *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at paras 9-14.

[36] *Langeberg Municipality* id at paras 9-14.

Department officials to implement court orders at international airports". Further, counsel hoped that a definitive judgment by this Court on the responsibility and accountability of immigration officers at international airports would bring certainty to the rights of those who seek to enter the Republic.

[42] On the other hand, the applicants submitted that the appeal should nonetheless be entertained. This is because "the court a quo misdirected itself by holding that [an] immigration official may be deputed to enter an area that they are not authorised to proceed into in order to implement a court order".

[43] None of these submissions hold water. I have already held that it would not be appropriate to decide on the alleged misdirection of the High Court in circumstances where there is no actual respondent in the appeal; where no appealable order has been made; and where the outcome of the appeal would have no practical effect. In the same vein, it would be undesirable, in a vacuum, to make abstract and academic pronouncements on the responsibility and accountability of immigration officials at an international airport, without a factual context that may inform a just resolution of the dispute or provide guidance for future conduct.

[44] It is so that the present matter does raise a constitutional issue of some import relating to the proper exercise of judicial powers. However, an appeal against the High Court's judgment will achieve nothing. It resolves no dispute. It declares no rights, duties or powers. And it has no practical effect on either the parties before the

Court or the public at large. Despite the importance of the Court's duties and powers in terms of section 172 of the Constitution, this is not an appropriate case in which this Court should delineate or give content to the adjudicatory powers of the courts for an advisory purpose.

Conclusion

[45] The application falls to be dismissed because the judgment of the High Court is not appealable. There is no live dispute that cries out for resolution. An order of this Court will have no practical effect on either the parties before the Court or the public at large. Also, there is no overriding consideration that makes it nonetheless in the interests of justice for us to hear the appeal. A concern that the High Court may have overstepped its mark by providing an advisory opinion to the Executive is not alone sufficient to make us hear the appeal. Moreover, there is no order of the High Court to upset on appeal. It follows that it is not in the interests of justice to grant leave.

Costs

[46] Since there was no opposition, the issue of costs does not arise.

Order

[47] The following order is made:

1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

For the applicants:	Advocate M Albertus SC and Advocate A Erasmus instructed by the State Attorney.
Appointed by the Court:	Advocate A Katz SC, Advocate D Simonsz and Advocate M Bishop.