IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 83440/2019

In the matter between:

INDEPENDENT EXAMINATIONS BOARD **Applicant**
(Respondent in the application for leave to appeal)

and

UMALUSI **First Respondent**
(Applicant in the application for leave to appeal)

PROFESSOR JD VOLMINK, NO **Second Respondent**

DOCTOR MS RAKOMETSI, NO **Third Respondent**

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

AC BASSON, J

[1] This is an application for leave to appeal brought by the first respondent ("Umalusi") against an interlocutory ruling of this court refusing Umalusi permission to file a further affidavit. The application to file a further affidavit was dismissed with costs, such costs to include the costs of two counsel where so employed.

Test for leave to appeal

[2] The merits of the application for leave to appeal must be considered against the background of the test for leave to appeal. It is now trite that section 17(1)(a)(i) of the Superior Courts Act[1] have raised the threshold for grating leave to appeal. Bertelsmann, J in *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*[2] explains:

> "[6] It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[3] The Supreme Court of Appeal in *S v Smith*[3] also had occasion to consider what constituted reasonable prospects of success in terms of section 17(1)(a)(i):

> "[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[4] There must therefore exist more than just a mere possibility that another court will, not might, find differently on both facts and law.

<u>Is this order appealable?</u>

[5] This appeal essentially hinges upon the question whether or not an appeal

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[1] Act 10 of 2013.
[2] 2014 JDR 2325 (LCC).
[3] 2012 (1) SACR 567 (SCA).

court has jurisdiction to hear this appeal. Umalusi argues that it does. The Independent Examinations Board ("IEB") holds a different opinion. The IEB argues that Umalusi is seeking leave to appeal before the merits of the matter have been considered or decided and thus opposes this application on the basis that the order is not appealable, alternatively, that the appeal, in any event, has no prospects of success.

[6] Umalusi advances several grounds of appeal.[4] It argues, *inter alia*, that this court erred in rejecting the explanation of a miscommunication between Umalusi and its legal team and instead finding that Umalusi waited until the last possible moment to file its further affidavit; that the court erred in finding that any prejudice which would be caused by allowing the further affidavit, cannot be resolved or ameliorated by way of an appropriate cost order; and that this court misdirected itself in finding that a completely new and contradictory case was made out in the further affidavit. I have considered all the grounds of appeal although I do not deal with each and every ground of appeal explicitly in this judgment. For the reasons, set out herein below, I am of the view that firstly, the order is not appealable and secondly, there are, in any event, no reasonable prospects that another court will come to a different conclusion.

[7] The IEB submits that the order is not appealable for two reasons: Firstly, an order dealing with the question whether or not to file a further affidavit is not appealable. In this regard the Supreme Court of Appeal has categorically declined to hear applications for leave to adduce a further affidavit. See in this regard *Adams & Adams Attorneys v Pointer Fashion International CC*[5] where the court held as follows:

> "[4] That recitation of the history of the litigation, and the description of what was before Prinsloo J and the orders that he made, makes it clear that he was dealing with an interlocutory matter, namely, whether to permit the new legal point to be raised by Pointer. The order was purely procedural in nature and disposed of no

[4] Umalusi raised 19 grounds for leave to appeal.
[5] (324/2013) [2014] ZASCA 11, 2014 JDR 0511 (SCA).

issue in the litigation between the parties. In the circumstances on well-established authority the order was not appealable."

[8] Umalusi relies on two decisions in support of its argument that the rejection of a further affidavit can ground an appeal on its own. The IEB contends that neither of the two judgments supports that contention.

[9] The first judgment relied upon is the decision of the Appellate Court in *James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons, NO* ("*Hamer*").[6] In *Hamer* the respondent sought leave to file a further affidavit (deposed to by a certain Mr Owens). In the High Court, Henochsberg J, denied the application for leave to introduce a further affidavit. After that ruling counsel for the respondent then conceded the case and the entirety of the application was dismissed. Counsel for the respondent indicated to the court that he would no longer be able to satisfy the court that the applicant was entitled to the relief sought. The dismissal of the application then served before the Full Bench on appeal. The issue of leave to file a further affidavit was but one of the grounds of appeal. What was before the Full Bench was the *dismissal* of the entire application and not only the issue of leave to file a further affidavit. This was therefore not an appeal, what is colloquially termed as a piece-meal application for leave to appeal.

[11] The latter point ties in with the submission advanced on behalf of the IEB that granting leave to appeal at this stage would result in a piece-meal appeal. Hearing appeals piece-meal has consistently been discouraged by our courts. In *Health Professions Council of South Africa and another v Emergency Medical Supplies and Training CC t/a EMS*[7] the Court, for example, cautioned against granting leave to appeal in circumstances where the issue on appeal is only but one of the issues to be decided and where the balance of the issues in the matter have yet to be determined.

[11] *Hamer* is therefore not authority for the proposition that a court will independently consider an appeal on the basis whether or not the court ought to

[6] 1963 (4) SA 656 (A).
[7] 2010 (6) SA 469 (SCA).

have allowed a further affidavit. To restate: the facts in *Hamer* are clearly distinguishable from the present matter. There the entire application has been dismissed. In other words, the merits have been disposed of finally by virtue of the order dismissing the application. In this matter, the court has not pronounced on the merits at all. The merits in this matter are still very much alive.

[12] The second matter on which Umalusi relies is the decision of the Appellate Division in *Zweni v Minister of Law and Order*.[8] Umalusi contends that even though an order may not necessarily possess all of the three attributes indicative of an order or judgment, such an order may nonetheless remain appealable if it has final jurisdictional[9] effect or is such to "*dispose of any issue or any portion of the issues in the main action or suit*" or "*irreparable anticipates or precludes some of the relief which would or might have been given at the hearing*".[10]

[13] The Court in *Zweni* identified the following three attributes of *"a judgment or order"*:

> "7. 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'…
> 8. 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…. The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief…"[11]

[14] With reference to the decision in *Zweni* Umalusi submitted that the order of this court refusing Umalusi permission to file a further affidavit is, firstly, final in its effect and not susceptible to alteration; secondly, definitive of the rights of the parties and; thirdly irreparably precludes the adducing of the evidence contained in the further affidavit at the hearing. Umalusi further submits that the evidence which were

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[8] 1993 (1) SA 523 (A).
[9] *See Jacobs and Other v Baumann NO and Others* 2009 (5) SA 432 (SCA) at 436F – G.
[10] *Ibid*.
[11] *Zweni* at 535I – 536B.

sought to be introduced in the further affidavit is relevant and crucial to a proper ventilation of the issues.

[15] IEB disagrees with this submission and submits that Umalusi misidentifies the right at play. The right which must be finally determined is the relief sought in the main application - not the "right" to adduce further evidence. Umalusi's right to relief sought in the application is the *dismissal* of the review application. This issue has not yet been decided. When this court refused permission to file a further affidavit, it did not, in doing so, pronounce on the merits of the application nor did it dispose of at least a substantial portion of the relief claimed in the main proceedings. The court in *Zweni* explains:

> "Stated somewhat differently, a decision is a ruling if it does not affect the relief sought in the main action - *Nxaba v Nxaba (supra)*; *Heyman v Yorkshire Insurance Co Ltd* 1964 (1) SA 487 (A) at 490H-491C; *Holland v Deysel*1970 (1) SA 90 (A) at 93A-C - or because no relief was granted on that claim *(Union Government (Minister of the Interior) and Registrar of Asiatics (supra* at 50-51)). See also *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921 (A) at 928.
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> 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. It is not in dispute that the decision of Goldstein J is characterised by all three these negative integers."

[16] The true nature of the order granted by this court is thus an interlocutory which is not final in effect. The authors in *Herbstein & Van Winsen*[12] explains:

> "An interlocutory order is an order granted by a court at an intermediate stage in the course of litigation, settling or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. Such an order may be either purely interlocutory or an interlocutory order having final or definitive effect. The distinction between a purely interlocutory order and an interlocutory order having final effect is of great importance in relation to appeals. The policy underlying statutory provisions prohibiting or limiting appeals against interlocutory orders is the discouragement of piece-meal appeals."

[17] Umalusi has therefore not met the *Zweni*-test. Consequently, the decision of this court to disallow the filing of a further affidavit it not final in nature and effect and therefore not susceptible to appeal.

Are there any prospects of success on appeal?

[18] Although I am not persuaded that Umalusi met the jurisdictional requirements to engage the appellate court, this application - even if it did (which it does not) - has no prospects of success. Briefly: No exceptional circumstances have been advanced by Umalusi to justify to be permitted to file a further affidavit. As pointed out in the judgment, Umalusi's explanation for the about-turn is wanting: Umalusi relied on the absence of annexure AA10 as a basis for the need for the further affidavit whereas this annexure was attached twice to the founding papers. I am in agreement with the submission on behalf of the IEB that Umalusi has provided nothing but remissness as an explanation. Also, and importantly, the prejudice that will result were leave to file a further affidavit granted, is significant. As a result of Umalusi's complete *volte face* change of justification, "*the entire application has to a large extent been rendered obsolete: This is not the kind of prejudice that can be cured by a costs order*."[13]

[12] 5th Ed, 2009 chapter 39 at 1205.
[13] Judgment ad para [29].

[19] I am thus not persuaded that another court will not come to a different conclusion in this regard as Umalusi's *volte-face.* Not once has Umalusi relied on the explanation it seeks to rely on now: Umalusi also did not rely on this explanation in any of its correspondence, meetings prior to the launch of these proceedings, the record or its answering affidavit. The entire basis of the dispute between the parties, and the present application is premised on an explanation which Umalusi now accepts does not explain the increase in fees. The prejudice and the massive wasted costs that will result in allowing Umalusi to file a further affidavit cannot be cured if Umalusi can curate its reasons after the IEB has challenged the reasons. Also, the prejudice is not only wasted costs, but also a fair procedure to hold a public body to account for the exercise of a public power.

[20] The application for leave to appeal therefore has not prospects of success.

Order

> "The application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel where so employed."

AC BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 January 2021.

Appearances

For the applicant:

AG South SC
Instructed by: Macrobert Inc

For the respondents:

Greg Fourie SC
Adv Irene de Vos
Instructed by: Brian Bleazart Attorneys