



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 31345/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
DATE	SIGNATURE

In the matter between:

LUNGHILE NURSING SCHOOL

Applicant

and

THE SOUTH AFRICAN NURSING COUNCIL

First Respondent

**THE APPEALS COMMITTEE OF THE
SOUTH AFRICAN NURSING COUNCIL
THE REGISTRAR OF THE SOUTH AFRICAN
NURSING COUNCIL**

Second Respondent

Third Respondent

JUDGMENT

SARDIWALLA J:

Introduction¹

- [1] This is an application for leave to appeal against the whole order by the respondents.

Background²

- [2] On 9 May 2019, an application was before me in the urgent court brought by the applicant against the first respondent to third respondents, that they be directed to register the enrolled learners of the applicant for the June 2018 intake R683-programme and to allow the learners to write the examinations scheduled to take place on 10th to 13th May 2019. On 9 May 2019, I handed down an order granting the relief that the applicant had sought as follows:-

1. The decision of the First Respondent taken on the 28th and 29th September 2017, is remitted back to the First Respondent for reconsideration *de novo*;
2. The Applicant is hereby directed to furnish the First and Third Respondent with the Midwifery training records for the period of September 2017, as requested by the First Respondent in the letter dated 2nd November 2017, by no later than close of business on the 10th May 2019;
3. The First Respondent is hereby directed, within 7 days of receipt of the records of Midwifery training for the period of September 2017, to consider the records and communicate its decision to the Applicant;
4. In the event the First Respondent after the consideration of the records is

¹ The parties shall in this judgment be referred to as they were in the court a quo.

² This judgment deals with the appeal against the judgment in the court a quo. It therefore proceeds on the premise that the reader is familiar with that judgment. In the interest of brevity evidence led before the court a quo will not be repeated in this judgment in any great detail unless material to the conclusions reached. Readers of this judgment are referred to the judgment of the court a quo and the record if any additional details are required. To facilitate reading, the same terminology as adopted in the court a quo will be followed to ensure consistency and hopefully ease of understanding.

satisfied that they comply with the standards, must within 7 days from date of communicating its decision to the Applicant, register the learners who meet the criteria for registration and eligible to write the examinations;

5. The first Respondent is directed within 7 days of registration of the learners, arrange a date no later than one month for the learners to write their examinations;
6. In the event the First Respondent is not satisfied that the records are in accordance with the standard, it shall in its decision set out the respects in which the records are not in accordance with the standards and prescribe remedial action to the Applicant to remedy any shortcomings so identified;
7. The Applicant shall within a period of a month after receipt of the remedial action, implement any remedial action or provide any further information as may be requested by the First Respondent;
8. The First Respondent shall within 7 days after receipt of additional information or implementation of any remedial action, satisfy itself that the records are in line with the standard, register the learners in terms of the criteria;
9. The First Respondent is directed, within 7 days of registration of the learners in terms of paragraph 8 above, arrange a date not later than one month, for the learners to write their examinations;
10. Costs of this application to be determined at a later stage.

[3] As a consequence, the first to third respondents brought an application for leave to appeal against the entire order. The appeal was before me on 21 August 2019.

Respondent's grounds of appeal

[4] The respondents disputes my findings and that the applicant was entitled to the relief granted to it. The respondent's grounds of appeal in essence are:-

1. That the matter was not urgent;
2. That the applicant could secure adequate and substantial redress in the ordinary course;
3. That the applicant did not establish a clear right;
4. That the Court does not have the power to make an order which is neither claimed in the relief by either party, nor canvassed in the papers or in argument; and
5. That the application should have been dismissed with costs.

Leave to appeal

[5] With that background it is appropriate now to consider [Section 17\(1\)](#) of the [Superior Courts Act 10 of 2013](#), which provides the test for an appeal as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard...”

[6] In considering the provisions of s 17(1)(a)(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court's view

of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. There is established jurisprudence in this Court that where an appeal has become moot the Court has a discretion to hear and dispose of it on its merits.

- [7] The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed previously before the Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage.³ But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.⁴

³ *Van Rensburg v Van Rensburg & andere* 1963 (1) SA 505 (A) at 510 A-C. The approach has been endorsed by the Constitutional Court. *CUSA v Tao Ying Metal Industries & others* (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68.

⁴ *Fischer & another v Ramahlele & others* (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13 and 14.

The powers of the Court

- [8] The main issue to be determined in this appeal is to what extent, if any, the court has power to make an order which is neither claimed in the relief by either party, nor canvassed in the papers or in argument.
- [9] Section 34 of Constitution guarantees the right to a fair trial which includes affording parties to the litigation a fair opportunity to adequately address material issues in the papers, by evidence or during argument. A basic rule of fairness is that a person who will be adversely affected by an act or a decision of the administration or authority shall be granted a hearing before he suffers detriment⁵. Peach sums up the *audi* rule as follows:⁶

“The audi alteram partem rule implies that a person must be given the opportunity to argue his case. This applies not only to formal administrative enquiries or hearings, but also to any prior proceedings that could lead to an infringement of existing rights, privileges and freedoms, and implies that potentially prejudicial facts and considerations must be communicated to the person who may be affected by the administrative decision, to enable him to rebut the allegations. This condition will be satisfied if the material content of the prejudicial facts, information or considerations has been revealed to the interested party.”

⁵ See De Smith, SA (1955) *“The right to a hearing in English Administrative Law”* 68(4) *Harvard Law Review* 569-599, 569.

⁶ See Peach, VL (2003) *“The application of the audi alteram partem rule to the proceedings of commissions of inquiry”* Thesis (LL.M. (Public Law))—North-West University, Potchefstroom Campus (Accessed at <http://hdl.handle.net/10394/58>), 8.

[10] Relying on **Salisbury Municipality v MacMuldrow Ltd**,⁷ the learned authors of Herbstein and Van Winsen, *The Civil Practice of High Courts of South Africa*. (5th Ed.)(Vol.1) p.924, state:

“Generally speaking, the court will not grant a judgment upon an issue that was not in dispute in the pleadings.”

[11] In **S v Van der Sandt** ⁸ Van Dijkhorst J said at 132 (c):

“A fair trial is in essence a proper ventilation of the dispute before an unbiased competent tribunal.”

[12] In **Kouesa v Minister of Home Affairs, Namibia and Others**⁹ the Namibian Court of Appeal said at 973 I-974 A:

“It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants neither in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the Judge’s point. It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel.”

[13] The principle has now received recognition by the Supreme Court of Appeal in **National Director of Public Prosecutions v Zuma** (Mbeki and others

⁷ **1916 AD 252**

⁸ **1997 (2) SACR 116** (W)

⁹ **1996 (4) SA 965** (NmS)

intervening)¹⁰ and confirmed in *Ekurhuleni Municipality v Dada NO and others*¹¹.

[14] At p. 287-288 (para 15), delivering a unanimous judgment, Harms DP in *Zuma* (*supra*) said:

“... in exercising the judicial function judges are themselves constrained by the law. ... This commendable approach was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues;”

[15] At p.289 (para.19) the learned Judge said:

*“The independence of the Judiciary depends on the Judiciary’s respect for the limits of its powers. ... its function is to adjudicate the issues between the parties to the litigation **and not extraneous issues.**”*(my emphasis).

[16] Finally, at p.299 (para.47) the learned Deputy President warned:

“Judgment by ambush is not permitted ... the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts.”

[17] Despite these authorities which clearly impose limitations on the judicial functions of judicial officers, there are however exceptions to the Rule where a court can decide an issue without hearing oral argument in court, provided that:

¹⁰ [2009] ZASCA 1; 2009 (2) SA 277 SCA

¹¹ [2009] 3 All SA 379 (SCA)

1. The issue was raised on the pleadings or affidavits;
2. The facts were canvassed in evidence; and
3. The court has invited the parties to make written submissions on the point.

[18] Another exception to the Rule would be an instance where even if an issue is not ventilated by either party on the papers, or in evidence, or in argument there is an agreement between the parties on that issue, the court may make an order on that issue.

[19] Having highlighted the relevant authorities it is clear that there is a general principle that is applicable and that the exceptions to the Rule are only permissible in circumstances where they do not prejudice a litigant's right to a fair trial. It is apparent from the Respondent's argument that there were issues raised that were not ventilated adequately, or the Respondents were not given an opportunity to make either verbal and or written submissions on, which I agree, would be in the interests of justice to have permitted them to do so and a failure to do so severely prejudiced their right to a fair trial. I must also agree that the interests of justice and the principle of *audi alteram partem* require that every litigant be given equal opportunity to make representations on matters that may adversely affect them, before such decision is taken. Although there are exceptions to the court's judicial limits, the respondents have in my view demonstrated that their rights were clearly compromised by the order that I handed down in so far as their contention that I did not invite the parties to make written or oral submissions on the relevant issues which ultimately provided the Applicant with final relief.

[20] In the above circumstances it follows that on that basis alone the application for leave to appeal must be granted.

[21] I therefore make the following order:

1. The application for leave to appeal is granted; and
2. The costs are to be costs in the appeal.

C M SARDIWALLA
JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	:	21 August 2019
Date of judgment	:	12 February 2020
Applicant's Counsel	:	Adv.: D Motsweni
Respondent's Counsel	:	Adv.: K Korf