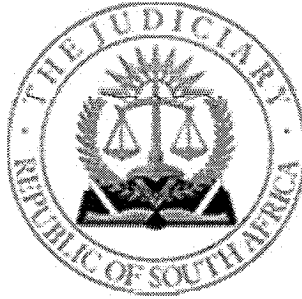


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 69804/2017

DELETE WHICHEVER IS NOT APPLICABLE	
1. REPORTABLE	☒ YES ☐ NO
2. OF INTEREST TO OTHER JUDGES	☒ YES ☐ NO
3. REVISED	
DATE: 22/2/19	SIGNATURE: <i>Seen</i>

In the matter between:

ASHU CHAWLA

Applicant

and

TREVOR ANDREW MANUEL

Respondent

JUDGMENT

WEINER, J

Introduction

[1] The applicant, Ashu Chawla (Chawla) applies for leave to appeal against the order I handed down on 13 December 2018. In such judgment, the respondent's

application brought in terms of the Promotion of Access to Information Act¹ ('PAIA') , was postponed to a date to be arranged with the Registrar for the hearing of oral evidence in terms of Uniform Rule of Court 6(5)(g). The issue referred to oral evidence was the question as to whether Sahara Computers (Pty) Ltd and Ashu Chawla (the respondents in the main application) currently have or have ever had in their possession the records which had been requested by the respondent, Trevor Andrew Manuel.

[2] The applicant in the application for leave to appeal, Chawla, contends that this matter is appealable despite the fact that the matter was postponed and referred to oral evidence. He contends that the basis for the order, referring the matter to oral evidence, was the finding, *inter alia*, that the applicant falls under the definition of a 'private body' in terms of PAIA and that PAIA is therefore applicable to him.

[3] The applicant relies upon *City of Tshwane Metropolitan Municipality v Afriforum* in regard to the test for appealability.² That case dealt with interim orders and whether or not they were final in effect and susceptible to an appeal. Mogoeng CJ referred to the fact that '*[t]he common-law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal....*'³

He further stated:

*'Unlike before [referring to Zweni v Minister of Law and Order 1993 (1) SA 523 (A)] appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability.'*⁴

¹ Act 2 of 2000.

² *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC).

³ *Ibid* para 40.

⁴ *Ibid*.

[4] The learned Chief Justice referred to the principles set out in *National Treasury v Opposition to Urban Tolling Alliance (OUTA)*.⁵ In that case, Moseneke DCJ stated as follows:

*'This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is the "interests of justice". To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.'*⁶

[5] The respondent does not submit that the present decision has any immediate and substantial effect and that the harm is serious immediate, ongoing and irreparable. The applicant however, contends that, although the order might be interlocutory in nature, it nevertheless disposes of the question as to whether the applicant falls within the purview of PAIA.

[6] He contends that the interests of justice require that leave to appeal be granted, as the finding as to whether or not the applicant falls within the purview of PAIA, is decisive of, and would dispose of the matter.

[7] The respondent argues that a referral to oral evidence lacks the essential features of an appealable order, as it is not final in effect, nor is such a referral definitive of the rights between the parties. Further, it does not dispose of a substantial portion, or indeed any, of the relief sought in the main application.

[8] In *Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo*⁷ the Appellate Division refused leave to appeal against a ruling that oral evidence be heard. Innes CJ held as follows:

⁵ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) (the OUTA case).

⁶ Ibid para 25.

⁷ *Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo* 1916 AD 50.

‘....There has been an application for relief, but no decision upon it. The prayer of the petition falls under nine separate heads, and in regard to none of them has any order been made. The application has merely been postponed for further evidence. When the enquiry is resumed the judge may decide in favour of the present applicants on the facts; or he may possibly, though very improbably, revise his view of the law upon further argument. But if he does neither; if he finds against the applicants on the law and the facts, and grants the relief prayed for, it will then be competent for them to appeal and to raise every point upon which they now wished to rely. The fact that the present application is for leave to appeal not against the order of the learned judge – for he has made none – but against his reasons.’⁸

[9] The respondent also refers to *Klep Valves (Pty) Ltd v Saunders Valve Company Ltd* where the Appellate Division relied on *Naidoo* and held that, in referring the matter to oral evidence, the court had not granted or refused any order in relation to the relief sought, and therefore the referral *‘was not an order and was consequently not appealable.’*⁹

[10] In *MAN Truck and Bus (SA) (Pty) Ltd v Dorbyl Ltd*,¹⁰ the SCA held that ‘the short answer’ to the submission that there was not a sufficient dispute of fact to warrant the court a quo’s referral to oral evidence was that ‘this direction is not appealable’ as it did not constitute a judgment or order under section 20(1) of the Supreme Court Act 59 of 1959 because it lacked any one of these attributes.¹¹

[11] The respondent further contends that the application for leave to appeal is not targeted at the Court’s ruling i.e. that the matter be postponed and referred to oral evidence, but instead at various aspects of the Court’s reasoning. Reference is made to *Absa Bank Limited v Mkhize* where the SCA held that an appeal lies against an

⁸ *Naidoo* (note 7 above) at 51-52.

⁹ *Klep Valves (Pty) Ltd v Saunders Valve Company Limited* 1987 (2) SA 1 (A) at 40G-41H.

¹⁰ *MAN Truck and Bus (SA) (Pty) Limited Ltd v Dorbyl Limited Ltd t/a Dorbyl Transport Products and Busaf* 2004 (5) SA 226 (SCA).

¹¹ *Ibid* paras 21-22. The Court found that it lacked the attributes as described in *Zweni v Minister of Law and Order* 1993 (1) SA 523 at 532J – 533B which stated, “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...”

order and not against the reasons.¹² This, the SCA reasoned, was a sound principle which has been confirmed in numerous decisions. See *Neotel (Pty) Limited v Telkom SA Soc Ltd*¹³ where the SCA stated as follows:

[18] Counsel for the appellant submitted that the finding it was urging this court to make, regarding the appealability, would not result in a piecemeal consideration of matters; that even though this court was being asked, in essence, to create an exception to the general principle that appeals do not lie in respect of the reasons for a judgment or order, the exception would be a narrow one and there was no danger of this court being inundated with appeals against reasons, as a result.

[19] Counsel readily conceded that he could not cite any authority directly in support of this 'novel' approach, but seemed to suggest that there was some indirect support for it in a dictum of Moseneke DCJ in International Trade Administration Commission v SCAW South Africa (Pty) Ltd (ITAC). There, the learned Deputy Chief Justice stated; "[w]hilst it is true that ordinarily an appeal lies against an order and not the reasoning in a judgment..." (emphasis added).

[20] The appellant's reliance on the decisions in Philani-Ma-Afrika and Nova Property is misplaced. In both matters the appeals were against substantive orders. In Philani-Ma-Afrika the appealability of an execution order for eviction, pending the final determination of the appeal by this court, was considered. This court held that the belief that the execution order was not appealable was erroneous and that it was clear that what was of paramount importance in deciding whether a judgment was appealable, was the interests of justice. In Nova Property the appealability of an order to compel discovery was considered. This court held that even though such an order was not appealable under the traditional test laid down in Zweni v Minister of Law and Order that test, as held in Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service was not exhaustive. Referring to Philani-Ma-Afrika, this court concluded that even though the interlocutory order was not appealable under the traditional test laid down in Zweni, it was appealable in terms of s 17(1) of the Superior Courts Act. ...

¹² *Absa Bank Limited v Mkhize and Two Similar Cases* 2014 (5) SA 16 (SCA) para 64.

¹³ *Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others* (605/2016) [2017] ZASCA 47 (31 March 2017).

[21] *The appellant's reliance on the dictum in ITAC is also misplaced. The Constitutional Court was not considering the issue of appealability, but mentioned that it was permissible and sometimes necessary for a court to look at the reasons for an order to fully grasp the reach and effect of that order. The dictum was obiter and, read in context, makes it clear that Mosenek DCJ was not implying that in exceptional cases an appeal lies against the reasons for an order.*

[22] *The contentions of the appellant's counsel effectively required this court to jettison a sound principle which has been confirmed in numerous decisions, including decisions of this court over a long period.*

[23] *While it is so that this court has in recent times, as is evident from the decisions referred to above, adopted a more flexible and pragmatic approach in determining whether interlocutory orders are appealable, that did not extend to making reasons of judgments, or orders, appealable.*

[24] *The approach contended for by the appellant not only holds the potential of "opening the floodgates", with its inherent challenges, but also the undesirable prospect of matters being disposed of in a piecemeal fashion. And, even more concerning, the 'hollowing-out', or erosion, of the substratum of judgments and orders that are not before this court, and the negative consequences accompanying such a process.¹⁴*

[12] The applicant argues that the finding that this Court made that the applicant falls under the definition of a 'private body' in terms of PAIA, is one of the bases upon which the matter was referred to oral evidence. Without such finding, the matter would not have been referred for oral evidence, and therefore this is a case where the interests of justice demand that leave to appeal be granted.

[13] The applicant sought to distinguish this matter from the decision in *Naidoo* on the basis that, in that case, no findings were made upon which the referral to oral evidence was based.¹⁵ However, this distinction is without merit. The respondent in *Naidoo* had applied to a judge in chambers to set aside a deportation warrant, to interdict his deportation, and for other relief. The application was opposed on the

¹⁴ Ibid paras 18-24.

¹⁵ *Naidoo* (note 7 above).

ground, *inter alia*, that the court had no authority to hear the matter. The judge expressed himself in favour of the view that the court had authority to go into the question. He thereafter found that he could not make a finding on the affidavits before him on the merits and directed that oral testimony should be adduced. He adjourned the case for that purpose. One of the jurisdictional requisites before referring the matter to oral evidence, would have been that the court has the authority to hear the matter. Similarly, in the present case, the finding that PAIA applied to the applicant, is a finding which led to the referral to oral evidence. However, as in Naidoo, *'the application for leave to appeal is not against the order of the Court – for it has made none – but against the reasons.'*¹⁶

[14] The judgment in *Naidoo's* case has consistently been followed. In *Klep Valves* the applicant had sought relief in the form of interdicts restraining the respondent from infringing the applicant's copyright in respect of certain drawings.¹⁷ The respondent also prayed for and was granted relief ancillary to the main prayer. On appeal the appellant contended that the court's ruling on one of the prayers, for an account of profits, was wrong and should be set aside.

[15] Grosskopf JA in *Klep Valves* stated as follows:

*'What is clear, however, is that the Court has not granted or refused any order for the giving of an account of profits, nor has the Court expressed any view on the circumstances which would justify such an order, or the effect which such an order would have. All these matters would appear to still be open to the Court a quo at the resumed hearing which is envisaged by the direction which I have quoted above. In these circumstances, the question arises whether this direction is appealable at all.'*¹⁸

[16] The applicant seeks to invoke the *City of Tshwane* judgment in stating that the Court should grant leave to appeal because one of the reasons for arriving at the order is impugned. However, as the respondent argues, a ruling postponing the application and referring it to oral evidence is unappealable, and the findings that the Court made in reaching this conclusion are irrelevant.

¹⁶ *Naidoo* (note 7 above) at 52.

¹⁷ *Klep Valves* (note 9 above).

¹⁸ *Ibid* at 40G-I.

[17] The respondent also distinguishes the present matter from the *City of Tshwane* case.¹⁹ Firstly, he states that that case does not involve an order referring the matter to oral evidence. Such an order is effectively a direction (as stated in the above authorities) and not an order *per se*. It differs in substance from an interim order. The respondent also argues that the *City of Tshwane* matter is not authority in respect of all matters, and that the 'interests of justice' requirement must be seen within the purview of the effect of the order granted. In that case the Constitutional Court held:

*'The appealability of interim orders in terms of the common law depends on whether they are final in effect. In this connection it must be borne in mind that the effect of the restraining and mandatory order granted is to mortify and prevent Council from implementing its resolution. And this is the resolution taken in terms of its constitutional and statutory powers. To say that this amounts to an intrusion by courts into the domain reserved exclusively for the executive, would not be an overstatement.'*²⁰

[18] The respondent contends that the *City of Tshwane* case refers to an order of the court, be it interim or final. Mogoeng CJ held that:

*'...The role of the final effect of an interim order recedes into the background when an interim order impermissibly trenches upon the sole terrain of the other branches of government. To arrest the execution of Council's policy decision as finally as the High Court has done before a determination of the grounds of review, is too drastic a measure to take in the circumstances.'*²¹

[19] In my view, and having regard to all the authorities quoted, I do not believe that the *City of Tshwane* prerequisites override the fact that a reference to oral evidence is unappealable – even if the basis upon which the order was granted is impugnable. I believe that this case – even taking into account the *City of Tshwane* requirements – is on all fours with the *Naidoo* decision.

Accordingly the following order is made:

1. The application for leave to appeal is dismissed with costs.

¹⁹ *City of Tshwane* (note 2 above).

²⁰ *Ibid* para 39.

²¹ *Ibid* para 42.



S E WEINER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Date of hearing: 14 February 2019

Date of judgment: 22 February 2019

Appearances:

Counsel for the Applicant: Adv. JJ Meiring

Instructing Attorneys: Vasco de Oliveira Inc.

Counsel for the Respondent: Adv. Tembeka Ngcukaitobi

Adv. Michael Mbikiwa

Instructing Attorneys: Cliffe Dekker Hofmeyer Inc.