THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 435/09

In the matter between:

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA **First Appellant**

PROFESSIONAL BOARD FOR EMERGENCY CARE PRACTITIONERS **Second Appellant**

and

EMERGENCY MEDICAL SUPPLIES AND TRAINING CC t/a EMS **Respondent**

Neutral citation: **Health Professions Council v Emergency Medical Supplies (435/09) [2010] ZASCA 65(20 May 2010)**

Coram: **Lewis, Ponnan, Bosielo and Shongwe JJA and Majiedt AJA**

Heard: **14 May 2010**

Delivered: **20 May 2010**

Summary: **Appeal struck from roll; discrete order, even if final in effect, should not be appealed against where balance of convenience requires that all issues in dispute be determined in one hearing.**

ORDER

On appeal from: Western Cape High Court (Cape Town) (Motala J and Manca AJ sitting as court of first instance):

The appeal is struck from the roll. The appellant is to pay the costs of the hearing, incurred from 30 April 2010, including those of two counsel.

REASONS FOR ORDER

Lewis JA (Ponnan, Bosielo and Shongwe JJA and Majiedt AJA concurring)

[1] On 14 May 2010 this court, after hearing argument on the appealability of the order of the high court, struck the appeal from the roll and ordered the appellant to pay the costs of the hearing including those of two counsel. These are the reasons for that decision.

[2] The first appellant, the Health Professions Council of South Africa (the Council), is created pursuant to s 2 of the Health Professions Act 56 of 1974. Its objects, set out fully in s 3, are in essence to administer, guide and control the various health care professionals governed by the Act, including emergency care practitioners (sometimes referred to as paramedics). The second appellant, the Professional Board for Emergency Care Practitioners (the Board) is created in terms of s 15 of the Act. Its objects include controlling and exercising authority in the training of persons as paramedics. The accreditation of training institutions and programmes is regulated by s 16.

[3] The respondent, Emergency Medical Supplies and Training CC (EMS), conducted a private training college and was accredited to train different levels of emergency care practitioners: basic ambulance assistants,

ambulance emergency assistants and critical care assistants. EMS was accredited as a training college by the Board. In 2004 the Board was reconstituted by members whom EMS alleges are its competitors. On 10 December 2006 the Board decided to withdraw EMS's accreditation in respect of all its training courses, which had the effect of closing the college. It informed EMS of the decision on 13 December without furnishing reasons for doing so.

[4] EMS appealed to the Western Cape High Court, Cape Town against the decision in terms of s 20 of the Act. It lodged a notice of appeal on 12 January 2007, citing various grounds, including the lack of jurisdiction of the body that took the decision; that the body comprised members who had material conflicts of interest, were actuated by an ulterior purpose or were reasonably suspected of having been biased.

[5] Section 20 reads as follows:

'Right to appeal

(1) Any person who is aggrieved by any decision of the council, a professional board or a disciplinary appeal committee, may appeal to the appropriate High Court against such decision.

(2) Notice of appeal must be given within one month from the date on which such decision was given.'

It is notable that the section does not set out any procedure for the appeal. EMS, not having any reasons for the decision, and having had no notice or knowledge of the meeting at which the decision was taken, requested the Council to prepare the record for the appeal. The Council declined.

[6] EMS then attempted itself to prepare a record and filed a lengthy 'founding affidavit' with several annexures in support of its grounds of appeal, on 12 January 2008. This was intended to serve as the record. The Council did not respond to it. Instead, it launched an application for an order declaring that the appeal notice was lodged out of time, or had lapsed, and in the alternative that the 'record' filed by EMS be struck out and substituted with a record prepared by the Council. In the alternative to that it asked for an order

that certain paragraphs of the 'founding affidavit', deposed to by Mr Craig Northmore of EMS, be struck out as being irrelevant, argumentative or vexatious. It also asked for an order as to the procedure to be followed in the appeal, necessitating a postponement.

[7] EMS opposed this application and filed an answering affidavit to which the Council replied. The Council did not deal with the merits of the appeal in any of its affidavits or in heads of argument. Motala J and Manca AJ presided over the hearing of the appeal and application. The principal issue with which they dealt was the nature of the appeal afforded by s 20, for this would determine some of the other issues raised by the council.

[8] EMS argued that the appeal was a wide one, such that the court would in effect rehear the dispute on evidence that had not served before the board when it took its decision. It relied in this regard on the classic statement of Trollip J in *Tikly & others v Johannes NO & others*[1] as to the nature of statutory appeals.

'The word "appeal" can have different connotations. In so far as is relevant to these proceedings it may mean:

(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information (*Golden Arrow Bus Services v Central Road Transportation Board* 1948 (3) SA 918 (A) at 924; *S A Broadcasting Corporation v Transvaal Townships Board and others* 1953 (4) SA 169 (T) at pp175-6; *Goldfields Investment Ltd v Johannesburg City Council* 1938 TPD 551 at p 554);

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong (eg *Commercial Staffs (Cape) v Minister of Labour and another* 1946 CPD 632 at pp 638-641);

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and

[1] 1963 (2) SA 588 (A) at 590F-591A. See also *Pahad Shipping CC v SARS* [2009] ZASCA 172 (2 December 2009), and Cora Hoexter *Administrative Law in South Africa* pp 63-64.

properly (eg *R v Keeves* 1926 AD 410 at pp 416-7; *Shenker v The Master* 1936 AD 136 at pp 146-7).'

EMS contended that its appeal under s 20 of the Act fell into the first class described by Trollip J.

[9] The Council on the other hand, argued that the appeal was one in the strict sense, such that regard could be had only to the evidence before the decision-making body. It relied in this regard on a number of cases in which appeals under s 20 of the Act against disciplinary decisions of the Council had been regarded as appeals in the true sense: the courts have had regard only to the material that had served before the disciplinary tribunal. I shall not deal with these cases for reasons that follow. The high court decided that the appeal against the Board's decision was of a different ilk from that of decisions taken by disciplinary tribunals. The latter keep full records of proceedings and the appeals against those decisions are made on the records and evidence before them. It held that the appeal lodged by EMS was a wide appeal and that the court was not restricted to the information before the Board when it made its decision.

[10] The high court made a number of other findings: that the notice of appeal was not out of time; that the appeal had been prosecuted within a reasonable period and had not lapsed; that because the appeal was a wide one the founding affidavit of EMS should not be struck out and replaced by a record prepared by the appellants; and that the alternative application for the striking out of paragraphs of Northmore's affidavit would be considered when the appeal was heard.

[11] The high court held also that the notice of appeal could serve as a notice of motion. It ordered that the appellants' application, save for that to strike out specific paragraphs, be dismissed, and postponed the hearing of the appeal sine die. The court also made orders as to the further procedures to be followed, and ordered the appellants to pay the costs in the application, save for those that might be incurred when the alternative application for striking out is heard.

[12] The appellants applied for leave to appeal against the finding that the appeal in terms of s 20 of the Act is a wide appeal, as well as against the orders that EMS's notice of appeal was not out of time, had been prosecuted within a reasonable period and had not lapsed. The high court granted leave to this court to appeal only against the finding that the appeal in terms of s 20 of the Act is a wide appeal.

[13] Before the hearing of the appeal this court requested counsel for all parties to address us on whether this finding is appealable. For although at first blush it appears to be a 'judgment or order' which is appealable in terms of s 20 of the Supreme Court Act 59 of 1959, being dispositive of a discrete issue, it also appears that the determination of an appeal on this issue alone might not conclude the lis between the parties and there might be a further appeal against the high court's decision on the appeal in terms of s 20 of the Health Professions Act.

[14] Appealability can be a vexed issue.[2] The appellants rely on the principles stated by Harms AJA in *Zweni v Minister of Law and Order*.[3] The learned judge said that, as a general rule, a judgment or order will be appealable if it has three attributes: it must be final in effect and not susceptible of alteration by the court of first instance; it must be definitive of the rights of the parties and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[15] There have been many glosses on the principle since. In *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [4] Hefer JA said that the three attributes were not cast in stone nor exhaustive. And in *Jacobs & others v Baumann NO & others*[5] this court reiterated the principle laid down in *Zweni* that in considering whether an order is final one must have regard to its

[2] See *Cronshaw & another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A) where Schutz JA said it is an intrinsically difficult issue, not always answered in the same way.
[3] 1993 (1) SA 523 (A) at 532I-533A.
[4] 1996 (3) SA 1 (A) at 10F-11C.
[5] 2009 (5) SA 432 (SCA) para 9.

effect.[6] But the court also stated that even if an order does not have all three attributes it may be appealable if it disposes of any issue or part of an issue. Conversely, however, even if an order does have all three attributes it may not be appealable because the determination of an issue in isolation from others in dispute may be undesirable and lead to a costly and inefficient proliferation of hearings. I shall elaborate on this later.

[16] The appellants submit that the finding that the appeal in terms of s 20 is a wide appeal does dispose of a substantial portion of the relief claimed. And it cannot be revisited by the high court. This much is true. But an appeal court must also have regard to the reason for refusing to entertain interlocutory appeals: a piecemeal determination of issues is undesirable. In *Guardian National Insurance Co Ltd v Searle NO*[7] Howie JA said that the 'piecemeal appellate disposal of the issues in litigation' was not only expensive, but that generally all issues in a matter should be disposed of by the same court at the same time. Thus even if, technically, an order is final in effect, it may be inappropriate to allow an appeal against it when the entire dispute between the parties has yet to be resolved by the court of first instance.

[17] It should not be forgotten that Harms AJA in *Zweni* also said[8] that 'if the judgment or order sought to be appealed against does not dispose of all the issues between the parties the balance of convenience must, in addition, favour a piecemeal consideration of the case. In other words, the test is then "whether the appeal – if leave were given – would lead to a just and reasonably prompt resolution of the real issue between the parties"'.

[18] In *Smith v Kwanononqubela Town Council*[9] Harms JA, referring to this statement in *Zweni*, considered that leave to appeal in the *Smith* case should

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[6] See also *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd* 2009 (3) SA 292 (SCA) where this court held that an order suspending contempt proceedings pending review was appealable.
[7] 1999 (3) SA 296 (SCA) at 301B-C. See also *Van Niekerk & another v Van Niekerk & another* 2008 (1) SA 76 (SCA) paras 3-7.
[8] At 531D-E.
[9] 1999 (4) SA 947 (SCA).

not have been given before all the proceedings before the court below had been determined. Most recently, in *National Director of Public Prosecutions v King* [10] Harms DP said:[11]

'It is, however, necessary to emphasize that the fact that an "interlocutory" order is appealable does not mean that leave to appeal ought to be granted because if the judgment or order sought to be appealed against does not dispose of all the issues between the parties the balance of convenience must, in addition to the prospects of success, favour a piecemeal consideration of the case before leave is granted. The test is then whether the appeal, if leave were given, would lead to a just and reasonably prompt resolution of the real issue between the parties.[12] Once leave has been granted in relation to a "judgment or order" the issue of convenience cannot be visited or revisited because it is not a requirement for leave, only a practical consideration that a court should take into account.'

[19] The point was elaborated upon by Nugent JA in a separate concurring judgment. He said:[13]

'There will be few orders that significantly affect the rights of the parties concerned that will not be susceptible to correction by a court of appeal. In *Liberty Life Association of Africa Ltd v Niselow*[14] (in another court), which was cited with approval by this court in *Beinash v Wixley* 1997 (3) SA 721 (SCA), I observed that when the question arises whether an order is appealable what is most often being asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course. I said that two competing principles come into play when that question is asked. *On the one hand justice would seem to require that every decision of a lower court should be capable not only of being corrected but of being corrected forthwith and before it has any consequences, while on the other hand the delay and inconvenience that might result if every decision is subject to appeal as and when it is made might itself defeat the attainment of justice* (my emphasis).

. . . .

I pointed out in *Liberty Life* that while the classification of the order might at one time have been considered to be determinative of whether it is susceptible to an appeal

[10] (86/09) [2010] ZASCA 8 (8 March 2010).
[11] Para 46.
[12] *Smith v Kwanonqubela Town Council* [above] para 16.
[13] Paras 50-51. The references in this passage were cited by Harms DP in his judgment as well in para 44.
[14] (1996) 17 ILJ 673 (LAC).

the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle.'

[20] In the *King* case the court concluded that the order in question (that the applicant be given access to the whole docket in a criminal case pending against him) was appealable, and that the balance of convenience required that the order be appealed because the inconvenience and prejudice that would be caused should the order not be set aside was considerable.

[21] In this case, however, it seems to me that the balance of convenience requires that the order on the nature of the appeal should not be viewed in isolation. While it is not susceptible to correction by the high court, there seems to be no reason to consider the issue before the s 20 appeal before the high court has run its course. There may yet be another appeal on the issues that have still to be determined.

[22] As pointed out by EMS, if the appeal were to succeed before us, the merits of the appeal under s 20 of the Act would still have to be decided and there would have to be a fresh determination of how the record should be constituted. It contends that because the appellants kept no record of the meeting of the Board, nor presented signed minutes, the record (a bundle of documents) that has been filed by the appellants is unsatisfactory. EMS might well challenge the record, and a new appeal on the same ground to this court might be brought. This means that the order as to the nature of the appeal was not final in effect, contends EMS. The only effect of a successful appeal would be that EMS would be precluded from relying on evidence that had not served before the Board when the decision was taken. And that in itself might give rise to a challenge to the record prepared by the appellants. The balance of convenience, EMS contends, does thus not favour the hearing of the appeal by this court.

[23] The appellants argue that if this court were to uphold the appeal, finding that the appeal under s 20 is a narrow one, then the issues before the high court will be reduced and the costs and inconvenience of determining what served before the Board (and should thus be considered by the high court) will be minimized. The submission sows the seeds of its own destruction. It is precisely this – the nature of the record – that is contested. The nature of the appeal will not itself determine what constitutes the record if this court were to hold that the appeal is a narrow one. There will still be contestation as to the adequacy of the record prepared by the appellants.

[24] I consider that the high court, in hearing the appeal under s 20 of the Act, should deal with all the outstanding issues: the merits of the appeal itself, the striking out application, and contentions as to the record. If there is to be an appeal against the high court's decision, the finding as to the nature of the appeal can most appropriately and fairly be determined at the stage when the merits of the appeal are also at issue.

[25] A court, when requested to grant leave to appeal against orders or judgments made during the course of proceedings, should be careful not to grant leave where the issue is one that will be dealt with in isolation, and where the balance of the issues in the matter have yet to be determined. Of course, where a litigant may suffer prejudice or even injustice if an order or judgment is left to stand – as would have been the case in *King* – then the position will be different.

[26] In so far as the costs of the hearing are concerned, EMS did not oppose the application for leave to appeal on the basis that the finding on the nature of the s 20 appeal was not appealable. It was only when this court asked for argument on the issue that EMS conceded that leave to appeal should not have been granted. The attorney for EMS wrote to the attorney for the appellants on 28 April 2010, suggesting that the appeal be withdrawn, and that the costs be costs in the cause. The offer was said to be open until close of business on 30 April. The appellants responded only on 3 May, declining

the offer. In the circumstances, I consider that the appellant should pay the costs of the hearing, which should run from 30 April.

[27] For these reasons we struck the appeal from the roll and ordered the appellant to pay the costs of the hearing, incurred from 30 April 2010, including those of two counsel.

C H Lewis
Judge of Appeal

APPEARANCES

APPELLANTS:	D I Berger SC (with him A T Ncongwane)
	Instructed by Gildenhuys Lessing Malatji
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	Honey Attorneys, Bloemfontein.
RESPONDENT:	P Tredoux (with him C Cutler)
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