IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, BHISHO)

CASE NO.: 60/2011 DATE: 4 MARCH 2011

In the matter between

FEDSAS & OTHERS APPLICANTS

and

DEPARTMENT OF EDUCATION & OTHERS RESPONDENTS

EX TEMPORE JUDGMENT

EKSTEEN J:

This application flows from review proceedings which were instituted in terms of the Promotion of Administrative Justice Act. I shall refer to the parties herein as they were referred to in the main application.

The applicants have embarked upon review proceedings in which they seek an order reviewing and setting aside the decision not to fill substantive educator posts at public school in the Eastern Cape which in 2010 were occupied by educators on a temporary basis. In addition they sought an interim order restoring and preserving the status *quo ante* by reinstating such educators *pendente lite*. After hearing argument and

considering further written heads of argument I made the following order:

1. The respondents are ordered to fill all substantive educator posts which in 2010 were occupied by educators on a temporary basis at public schools in the Eastern Cape Province within 5 days of the date of the service of this order by reinstating and continuing to employ such educators pending the finalisation of the review proceedings instituted in this court under case no. 60/2011.

The respondents have filed an application for leave to appeal against the granting of this relief. In response the applicants filed an application in terms of Rule 49(11) of the Uniform Rules of Court wherein they seek a direction that the relief granted should not be suspended by the appeal process and should be implemented with immediate effect.

I requested that the parties address me particularly on the question whether the grant of an interim interdict *pendente lite* was appealable. Appeals from judgments or orders from the High Court are governed by section 20 of the Supreme Court Act, 59 of 1959. Section 20(1) and (2) are of application, they read as follows:

"(1) An appeal from a judgment or order of the

court of a Provincial or Local Division in any civil proceedings or against any judgment or order of such a court given on appeal shall be heard by the Appellate Division or a Full Court, as the case may be.

(2)(a) If leave is granted under subsection (4)(b) to appeal against the judgment or order, in any civil proceedings, of a court constituted before a single judge, the court against whose judgment or order the appeal is to be made or the Appellate Division, according to whether leave is granted by that court or the Appellate Division, shall direct that the appeal be heard by a Full Court unless it is satisfied that the questions of law and of fact and the other considerations involved in the appeal are of such a nature that the appeal requires the attention of the Appellate Division."

The jurisdictional requirements for the civil appeal emanating from a High Court sitting as a court of first instance is therefore twofold. They were set out by HARMS AJA in the matter of **ZWENI v THE MINISTER OF LAW AND ORDER** 1993(1) SA 523 at 531B-E as follows:

"The jurisdictional requirements for a civil appeal emanating from a Provincial or Local Division sitting

as a Court of first instance are twofold:

(1)the decision appealed against must be a 'judgment or order' within the meaning of those words in the context of s 20(1) in the Act; and

(2)the necessary leave to appeal must have been granted, either by the Court of first instance, or, where leave was refused by it, by this Court. Leave is granted if there are reasonable prospects of success. So much is trite. But, if the judgment or order sought to be appealed against does not dispose of all of 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."

The question whether the decision is an appealable judgment or an order has been the subject of much legal debate it seems to me that this debate has now been substantially settled and explained by the Supreme Court of Appeal in **ZWENI v THE MINISTER OF LAW AND ORDER**. HARMS AJA (as he then was) summarised the authorities as follows at page 531 and

following:

"I would summarise the matter as follows:

1. For different reasons it was felt down the ages that decisions of a 'preparatory or procedural character' ought not to be appealable (per SCHREINER JA in **PRETORIA GARRISON INSTITUTES** case *supra* at 868). One is that, as a general rule, piecemeal consideration of cases is discouraged. The importance of this factor has somewhat diminished in recent times (**SA EAGLE VERSERKERINGSMAATSKAPPY BPK v HARFORD** 1992(2) SA 786 (A) at 791B-D). The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution.
2. In order to achieve this result, a number of different legislative devices have been employed from time to time. The requirement of leave to appeal is one. Another is to prohibit appeals unless the order appealed against has the effect of a final judgment. And the Courts have, by way of interpretation, held consistently that rulings are not appealable decisions.

3. The expression 'judgment or order' in s 20(1) of the Act has a special, almost technical, meaning; all decisions given in the course of a resolution of a dispute between litigants are not 'judgments or orders'... .

4. The word 'judgment' has (for present purposes) two meanings, first the reasoning of the judicial officer (known to American jurists as his 'opinion'), and second, 'the pronouncement of the disposition'. (Garner A Dictionary of Modern Legal Usage sv 'Judgments', 'Appellate Court') upon relief claimed in a trial action. In the context of s 20(1) we are concerned with the latter meaning only. An 'order' is said be a judgment for relief claimed in application proceedings... . I would venture to suggest that the distinction between 'judgment' and 'order' is formalistic and outdated; it performs no function and ought to be discarded,

5. Section 20(1) of the Act no longer draws a distinction between 'judgments or orders' on the one hand and interlocutory orders on the other. The distinction now is between 'judgments or orders' (which are appealable with leave) and decisions which are not 'judgments or orders'... .

6. Whether so-called 'simple interlocutory orders' ie

> 'all orders pronounced by the Court upon matters incidental to the main dispute preparatory to or during the progress of the litigation'

and not having a final or definitive effect, are either 'judgments or orders' or simply 'rulings' has not yet been decided by this Court... .

7. In determining the nature and the 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 to 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 often stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief...

> 9. The fact that a decision may cause a party an inconvenience or place him at a disadvantage in litigation which nothing but an appeal can correct, is not taken into account in determining its appealability. ... To illustrate: the exclusion of certain evidence may hamper a party in proving his case. That party may notionally be able to prove it by adducing other evidence. In that event an incorrect exclusion would not necessarily have an effect on the final result. In deciding upon the admissibility of evidence a court is not called upon to speculate upon or devine (with or without the assistance of the parties) the ultimate effect of its decision on the course of the litigation. ..."

The relief granted in this matter is an order *pendente lite* only which serves merely to preserve the status quo ante, it does not dispose of any portion of the relief sought in the main application. For this reason it fails the first test to qualify as a judgment or order in terms of section 20. Indeed if the grant of an interim interdict *pendente lite* were to be appealable it would defeat the very purpose of the remedy. The test which has been applied for many years to determine whether a matter is interlocutory was approved afresh in **AFRICAN**

WANDERERS FC v WANDERERS FC where MULLER JA states as follows:

> "The principle to be applied in determining whether a preparatory or procedural order is purely interlocutory is laid down in the leading case of **PRETORIA GARRISON INSTITUTES v DANISH VARIETY PRODUCTS (PTY) LTD**, namely that such an order is purely interlocutory unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or unless it 'irreparably anticipates or precludes some of the relief which would or might have been given at the hearing.' Earlier judgments which laid down a further test, namely whether the order causes irreparable prejudice, are overruled by the majority judgment in **PRETORIA GARRISON INSTITUTES** case, in so far as they purport to take into account prejudice - such as the loss and inconvenience caused by an interim interdict - which does not directly affect the issue of the suit."

An interlocutory order may be revisited at any time by the court of first instance (see **ZONDI v THE MEC OF TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS** 2006(3) SA 1 (CC)). The order granted in this matter is also not final in effect and

may indeed be revisited by the court of first instance. It has been held for many years that the refusal of an interim interdict is a final judgment and therefore appealable. The same does not hold true for the grant of an interim interdict, no appeal lies against an order granting an interim interdict *pendente lite* (see for example **DAVIS v PRESS & CO** 1944 CPD 108; **AFRICAN WANDERERS FOOTBALL CLUB (PTY) LIMITED v WANDERERS FOOTBALL CLUB** 1977(2) SA (A); **KNOX D'ARCY LIMITED AND OTHERS v JAMISON AND OTHERS** 1996(4) SA 348 (A); see also **HERBSTEIN AND VAN WINSEN** the Civil Practice in the High Courts of South Africa, 5th edition, volume 2 at page 1209.

Mr Mbenenge on behalf of the respondents argues, however, that the court has assumed jurisdiction where none exists. This argument centres on the interim relief. It is argued that the interim relief granted reinstates educators in their earlier position and therefore it is a labour dispute and falls within the jurisdiction of the Labour Courts. Mr Euijen on the other hand submits that the dispute before this court is purely of an administrative nature. The cause of action does not concern the contractual relationship between the respondents and educators and no reliance is placed upon these issues. This being so the issue is not a labour dispute, the dispute is an administrative one which has at its base the Constitutional

right of learners to basic education as envisaged in section 29 of the Constitution. There is no dispute between the parties relating to the jurisdiction of this court in the main application, nor about the court's inherent power to grant interim relief in controlling its process. The lawfulness of the termination of the contracts of educators as between employer and employee is not an issue before this court, nor is it relevant. The interim relief sought is sought in terms of section 38 of the Constitution of South African. The applicants *locus standi* to approach this court in terms of section 38 is not challenged. Section 38 empowers the court to grant appropriate relief where it is alleged that subject's rights in terms of the Bill of Rights have been infringed. Currently it is common cause that at best for the respondents 4 471 educator posts are vacant in public school as a result of factors set out in my reasons for judgment. The respondents argue in terms of the relevant legislation these positions need still to be identified, advertised, sifted and assessed by interviewers. Then the Governing Bodies must make recommendations to the Head of the Department in respect of the appointments. It accordingly says these posts may be filled by the end of April. This will have a devastating impact on the Constitutional right of learners in the Eastern Cape. For this reason I consider that there is only one manner to cure the infringement and that was the order for the reemployment of those who have already

been sifted and approved, that is, those who occupied these positions before 31 December 2010. This is considered to be appropriate relief *pendente lite*, it has nothing to do with any labour dispute.

In the circumstances I am of the view that the order *pendente lite* is not appealable. The application for leave to appeal is accordingly dismissed. The respondents are ordered to pay the costs of the application.

In these circumstances the application in terms of Rule 49(11) essentially becomes academic. Mr Euijen on behalf of the applicants urged it upon me that even if I did dismiss the application for leave to appeal I should grant the order in terms of Rule 49(11) because, he submits, that the respondents may well resolve to petition the Chief Justice for leave to appeal and therefore again suspend the order. It seems to me, however, that an order as sought by the applicants can only be granted in circumstances where there is an appeal process pending which has the effect of currently suspending the judgment of the court. To grant such an order otherwise would be a mere academic exercise, one upon which the court will not embark. The applicants may renew their application on the same papers duly amplified if necessary in the event of a petition being submitted.

To note an appeal or for that matter to take any other step with the sole purpose of suspending the order of the court in circumstances where the appeal process would be an exercise in futility is an abuse of the process of court. (See **ABSA BANK LIMITED v OLIVIA PROPERTIES** 1999(4) SA 348 (A).) The circumstances of this case were very similar to the present noting an appeal against an order which was obviously interim and therefore not appealable. In these circumstances I consider it appropriate to express my views on the application in respect of Rule 49(11).

It is trite that in exercising a discretion the court should have regard *inter alia* to the following matters:

1. The potentiality or irreparable harm or prejudice being sustained by the respondents on appeal if leave to execute were to be granted and by the applicants if leave to execute were to be refused.
2. The prospects of success on appeal including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted with a *bona fide* intention of seeking to reverse the judgment or for some indirect purpose.
3. Where there is a potentiality of irreparable harm or prejudice to both parties, then the balance of hardship or

convenience, as the case may be.

I have in my reasons for judgment considered the balance of convenience and the prejudice which either party may suffer if the interim order were granted. I am of the view that the interim order is plainly not appealable and if leave were to be granted I do not consider the prospects of success to be good. Decisive, however, is the plight of learners who, on a large scale are left without educators pending the resolution of the current dispute. The callous response of the respondents is essentially that they should simply wait and that their problems may be attended to at the end of April. The application as I have said is brought in terms of section 38 of the Constitution *inter alia* in the public interest. Their interests are accordingly considerations which are to be considered in these circumstances.

I have had the benefit of affidavits filed in terms of the Rule 49(11) application and a full answering affidavit. I have heard argument on the issue and I have had the benefit of heads of argument filed on behalf of the respondents. I have given careful consideration to these issues. Lest there be any misunderstanding, had I not come to the conclusion today that this matter was not appealable I would have granted the order in terms of Rule 49 (11).

In the circumstances I consider that the applicants are entitled to the costs of the application brought in terms of Rule 49(11).

In the result:

1. The application for leave to appeal is dismissed.
2. The Respondents are ordered to pay the cost of the application for leave to appeal and the costs occasioned by the application in terms of Rule 49(11).

JW EKSTEEN

JUDGE OF THE HIGH COURT

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