Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 41235/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

SIGNATURE **DATE** ..15 AUGUST 2022

In the application for leave to appeal between:

KEBONE MASANGE Applicant
(ID NO: […])

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR GENERAL: HOME AFFAIRS Second Respondent

In *re*:

KEBONE MASANGE Applicant
(ID NO: […])

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR GENERAL: HOME AFFAIRS Second Respondent

JUDGEMENT

NDLOKOVANE AJ

INTRODUCTION

[1.] The applicant applies for leave to appeal to either the full court of this Division or the Supreme Court of Appeal ('the SCA'), against the whole judgement and orders I granted on the 23 May 2022. In particular, the leave to appeal is against paragraphs 13, 22, 23, 24, 26, 27, 29, 30, 81-91 of my order, which I handed down on 23 May 2022, dismissing his interlocutory application lodged in terms of Rule 30A(2) of the Uniform Rules of Court.

[2.] The applicant being disgruntled by the aforesaid orders I made in the written judgement granted on 23 May 2022, applies on grounds fully set out in its application for leave to appeal, to appeal against the said orders. I do not intend repeating those grounds of appeal in this judgement by reason that the notice of application for leave to appeal constitutes part of these appeal papers. The application is opposed by the first and second respondents.

[3.] The first question that falls to be considered is that of the criterion or test to be adopted in an application such as the present. For the purposes of this application, Section 17(1) of the Superior Courts Act 10 of 2013 as amended (the Act), provides for the grounds upon which leave to appeal may be considered.

[4.] Section 17(1) at relevant parts reads as follows:

> "*17(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, including conflicting judgments on the matter under consideration.*

[5.] With the enactment of s17 of the Act, the test has now obtained statutory force and is to be applied using the word '*would'* in deciding whether to grant leave. In other words, the test is would another court come to a different decision. In the decision of the ***Mont Chevaux Trust v Goosen & 18 others,***[1] the land claims court held, *albeit obiter*, that the wording of the subsection raised the bar for the test that now has to be applied to any application for leave to appeal.

BACKGROUND FACTS

[6.] The background facts relevant to the issue for determination are succinctly summarised in the applicant's heads of arguments as follows:

6.1 *"On 1 September 2020, the applicant was arrested without a warrant of arrest as he was found to be an illegal foreigner on the grounds that he contravened certain sections of the Immigration Act 13 of 2020.*

[1] 2014 JDR 2325

6.2 On 2 September 2020, the applicant launched an urgent application ("the main application") among others to be released from detention and that his arrest and subsequent detention be declared unlawful as well as his impending deportation be declared invalid.

6.3 On 30 October 2020, the respondents filed their answering affidavit to the main application.

6.4 The applicant alleges that in the respondents' answering affidavit, they referred to various documentation and that in order to prepare and refute the allegations contained in the respondents' answering affidavit, he needs the necessary particulars and/or documents to place him in a position to depose to a replying affidavit on specific issues.

6.5 The applicant contends that without these documents (the supporting documents to the respondents' answering affidavit), He will be met with evidence and be confronted with issues which have been pleaded in a general and vague manner vis-à-vis the respondents' position where he has not received sufficient information and/or documentation to deal with such evidence.

6.6 On 16 April 2021, the applicant served a notice in terms of Rules 35(12) and 35(14) ("the notice") on the respondents.

6.7 The notice required the respondents, in terms of Rule 35(12) to produce documents allegedly referred to in its answering affidavit and, in terms of Rule 35(14), to produce documents which are relevant to the matter.

6.8 On 23 April 2021, the dies to comply with the applicant's notice expired.

6.9 The respondents allegedly failed to comply with the applicant's notice and on 28 April 2021, the applicant served a notice in terms of Rule 30A(1) on the respondents requesting the respondents to remedy their non-compliance with the notice in terms of Rule 30A(1) within 10 days.

6.10 On 12 May 2021, the dies for the respondents to comply with the applicant's notice in terms of Rule 30A(1) expired.

6.11 On 15 June 2021, the applicant launched an application in terms of Rule 30A(2) to firstly, compel the respondents to provide the documents sought by him in paragraphs 1, 2 and 3 of his notice and, secondly, in respect of his notice in terms of Rule 35(13) for a directive that the provisions of Rule 35 relating to discovery apply to the main application.

6.12 On 23 May 2022, I dismissed the applicant's interlocutory application and found that the applicant first had to approach the court in terms of Rule 35(13) to make the rules relating to discovery applicable to the main application".

I now turn to deal with the applicant's grounds of appeal.

[7.] The applicant contends in its notice of application for leave to appeal from paragraphs 7-14, fully sets out the grounds upon which the leave to appeal is premised . As I indicated earlier in my judgement that I intend not singly dealing with same for the reason I furnished earlier.

7.1 To mention just a few peculiar points to the issues for determination, the applicant submits that the judgments I relied on are distinguishable from this

case, and that I misdirected myself by relying on those judgments. Of relevance was the applicant's contention that as a single judge, I was bound to follow the decision in the matter of ***Machingawuta and Others v Mogale Alloys Pty Ltd & Others,***[2] as it is a judgment within this the above mentioned division. In the ***Mogale Alloys*** case, the court held that the leave provided in Rule 30A is wide enough to cover the failure to comply with the request made in terms of Rule 35(12). Therefore as a single judge, I should have followed the decision within my division and further ought to have compelled the respondents to produce the documents as sought by the applicant in paragraph 1, 2 and 3 of his notice.[3]

WHETHER MY ORDER OF 23th MAY 2022 IS APPEALABLE

[8.] The applicant contends that the order I made has a final effect as the applicant will suffer the following prejudice if the orders I made are not set aside and/or replaced:

8.1 He will be unfairly prejudiced if he is called upon to file a replying affidavit without documents and/or particulars to which I have found that he is entitled to.[4]

8.2 the consequences of the order I made are of such nature that he will have to answer certain allegations based on certain documents and/or information that have not been provided to him.[5]

[2] 2011ZAGPJHC 197,23 September 2011
[3] Notice of Application for Leave to Appeal at para 18; Applicant's Heads of Argument at para 12.4.
[4] Applicant's Heads of Argument at para 14.3.
[5] Applicant's Heads of Argument at para 14.4.

[9.] In contrast, the respondents on the other hand contend that the true nature of the order I granted is interlocutory and is not final.[6] In this regard the respondents referred to the judgment in ***Zweni v Minister of Law and Order***,[7] where the court identified the following three (3) attributes of a 'judgment or order':[8]

> "*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 often-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief…"*[9]

[10.] The respondents aver that in the context of the *Zweni* judgment, the right which must be finally determined is the relief sought in the main application and not the 'right' to produce documents.[10] The respondents further aver that the

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[6] Respondents' Heads of Argument at para 17.
[7] 1993 (1) SA 523 (A).
[8] Supra n21.
[9] Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 535I-536B.
[10] Respondents' Heads of Argument at para 18.

applicant's right to the relief sought in the main application is to interdict his deportation after he was declared an illegal foreigner and that issue has not yet been decided.[11] It is also the respondents' contention that when I dismissed the interlocutory application for the production of documents I did not pronounce on the merits of the main application, neither did I dispose of at least a substantial portion of the relief claimed in the main proceedings.[12]

[11.] The respondents further highlight that the Court in *Zweni* after analysing the relevant authorities concluded as follows:

> "*In the light of these tests and view of the fact that a ruling is the antithesis of a judgment or order, it appear 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.*"[13]

[12.] The respondents accordingly contend that in applying the three (3) legged test in *Zweni* the following ensue:[14]

> *(1) "My order dealing with the Rule 35 application is interlocutory and does not have the final effect. Further that my order can still be altered*

[11] Supra.
[12] Supra.
[13] Zweni supra n24 at 536B.
[14] Respondents' Heads of Argument at para 20.

if the applicant follows the right procedure to make an application in terms of Rule 35;

(2) My order is not final and definite determination of the rights between the parties and that no issue pertaining to the dispute in the main application has been decided; and

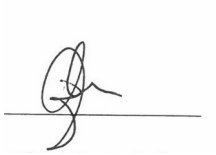
(3) My order has not dealt with or disposed of at least a substantial portion of the relief claimed in the main proceedings and that the relief claimed in the main proceedings is an interdict against deportation. Further that that was not the subject of the interlocutory application.

[13.] The respondents submit that the applicant has not met the *Zweni*-test and consequently my decision to dismiss a Rule 35 interlocutory application is not final in nature and effect and therefore not appealable.[15]

[14.] In conclusion the respondents submitted that the documents sought are not in its possession and same has been communicated to the applicant on numerous occasion. The respondents referred me to case authorities supporting their contention.

[15.] Having considered the arguments presented by both parties in support of their contentions, particularly the one that another Court might take a different view, I am of the view that there is a reasonable prospect that another court would differ with me. Consequently, leave to appeal ought to be granted to the Full Court of this division and the costs of the application for leave to appeal, be costs in the appeal.

[15] Respondents' Heads of Argument at para 21.



N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 15 August 2022

APPEARANCES

FOR THE APPLICANT:	ADV. J H GROENEWALD
FOR THE RESPONDENTS:	ADV. M M MOJAPELO with Adv. F. THEMA
HEARD ON:	15 JULY 2022
DATE OF JUDGMENT:	15 AUGUST 2022