CASE NO.: A 155/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JACOB ALEXANDER **APPLICANT**

and

IMMIGRATION SELECTION BOARD **RESPONDENT**

CORAM: LIEBENBERG, J.

Heard on: 06.12.2010
Delivered on: 27.01.2011

JUDGMENT

Application for leave to Appeal

LIEBENBERG, J.: [1] This is an application for leave to appeal against this Court's judgment and order, including the order of costs, dismissing applicant's application in terms of Rules 35(12) and 53, read with Rule 6(11) of the Rules of the High Court of Namibia. In his application applicant sought an order against the respondent, the Chairperson of the

Immigration Selection Board, compelling her to disclose a document, referred to in the papers as "the legal opinion", obtained from the Board's legal practitioners. Respondent opposes the application.

[2] The grounds upon which the application for leave to appeal are founded, are the following:

"1. The Learned Judge erred in failing to distinguish the present case which involved a claim ofprivilege over advice sought by an organ of state for the primary purpose of guiding it in the performance of a statutory duty, from claims of privilege asserted over advice received in relation to litigious disputes between private parties.

2. The learned Judge erred in failing to find that a party cannot deploy the fact of legal advice and matters relating to the contents of that advice for the purposes of advancing its case in litigation without waiving its privilege over that advice.

3. The Learned Judge erred in finding

3.1. that it was not possible objectively to infer that the gist, summary or conclusion of the legal opinion obtained by the Respondent was disclosed in paragraphs 19.1 to 19.2 of the affidavit of Ms Hiveluah, and

3.2 that the Applicant had failed to show that, based on principles offairness and consistency, the Court should find that there had been an imputed waiver.

4. Having failed to find that a case for waiver of privilege had been made out by the applicant with reference to the papers alone, the learned Judge erred by failing to take a "judicial peek" at the opinion to determine whether principles of fairness and consistency demanded its disclosure.

5. The Learned Judge erred in making a costs order against the Applicant.

6. The learned Judge should have found....."

[3] Appeals to the Supreme Court are governed by the provisions of s 18 of the High Court Act 16 of 1990 which provides as follows:

"(1) An appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal shall, except in so far as this section otherwise provides, be heard by the Supreme Court.

(2) .....

(3) No judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall

be subject to appeal save with the leave of the court which has given the judgment or has made the order, or in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court. "

[4] The Supreme Court in the case of *Andreas Vaatz and Another v Ruth Klotzsch and Others*, (unreported) delivered on 11.10.2002; and in *Aussenkehr Farms (Pty) Ltd v Minister of Mines and Energy* 2005 NR 21 (SC), with approval, referred to the meaning ascribed to the words 'judgment' and 'order' as set out by Erasmus - *Superior Court Practice*, para A1-43 where the learned authors concluded that, in order to be an appealable judgment or order, it had to have three attributes, namely:

"(i) the decision must be final in effect and not susceptible to alteration by the Court of first instance;

(ii) it must be definitive of the rights of the parties, ie it must grant definite and distinct relief; and

(iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

In *Aussenkehr (supra)* the Court, also with approval, referred to *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) where it was said that a non-appealable decision or 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."*

[5] From the aforestated judgments it then seems clear that before a judgment or order, arising from interlocutory proceedings, becomes appealable with leave of the Court in terms of s 18 of Act 16 of 1990, it has to have *all three* attributes; because in *Aussenkehr (supra)* at 29G-H, it is stated that:

"Although the order by the Court, in the present instance, may have the first attribute of a final

judgment or order, it lacks the other two attributes. That, in itself, is sufficient to affect the appealability of the order." (Emphasis provided)

[6] In the present instance, applicant was thus required to show that the order made by this Court in interlocutory proceedings, dismissing applicant's application for disclosure of a legal opinion in terms of the Rules, meets the above stated requirements (attributes).

[7] Applicant does not contend that the order dismissing applicant's application for disclosure of the opinion was "final in effect and not susceptible to alteration by the Court of first instance". On the contrary, Mr. *Chaskalson,* argued that, in their view, because the order *is* interlocutory, it will always be open to reconsideration at a later stage in the review application; and that there was a real likelihood that the same issue will then resurface. Thus, the order sought to be appealed against, clearly lacks the first attribute and as was stated in *Aussenkehr (supra),* this in itself would be sufficient to affect the appealability of the order.

[8] As regards the remaining attributes, applicant did not argue that the order in any way was "definitive of the rights of the parties" and that the effect thereof would dispose of "at least a substantial portion of the relief claimed in the main proceedings". This was neither contended during this application and there is nothing on record showing that the order, in itself, satisfies the remaining two attributes. Hence, I am unable to see how the Court's refusal for allowing the applicant access to the legal opinion in possession of the respondent could be seen to be definitive of the rights of the parties; neither does the order have the effect that a substantial portion of the review proceedings is disposed of. Whether the decision taken by the respondent meets the requirements of fairness still remains to be considered during the main application and if the legal opinion were to play any role during those proceedings, I am satisfied that the finding of the court of first instance will not *primarily* be determined by the legal opinion obtained by the respondent. This Court's order (ruling) was procedural in nature on the production or otherwise of evidentiary material in the course of pending review proceedings, nothing more.

[9] In my view, none of the attributes were shown to be present in the present instance and the only conclusion I can come to is that the order, dismissing applicant's application for discovery in terms of Rule 35 (12), is not appealable.

[10] Mr. *Chaskalson,* appearing for the applicant, tried to convince the Court in granting leave to appeal against its earlier ruling by extensively arguing the prospects of success on appeal; and after re-hashing the facts and argument upon which the application for discovery is based, submitted that there is a reasonable prospect that a Court of Appeal would come to a different conclusion. Applicant placed specific reliance on what was decided in *Rio Tinto Ltd v Federal Commissioner of Taxation,* [2005] FCA 1336, an Australian Federal Court decision on the discovery of documents for which legal professional privilege is claimed. I have studied the case and although I find it most informative on the issue of waiver of privilege, I am respectfully of the view that, for purposes of this application, it does not further his cause.

[11] Whereas I have already come to the conclusion that the interlocutory order against which leave to appeal is now sought by the applicant is not appealable, there is no need to deal with the prospects of success on appeal argued before me; neither to decide whether the Court of Appeal - in the light of what was said in *Rio Tinto (supra)* - would come to a different conclusion or not. That seems to be a futile exercise and it seems worthwhile repeating what was stated in *Eric Knouwds NO v Nicolaas Cornelius Josea and Another,* (unreported) Case No. SA 5/2008 (Supreme Court of Namibia) delivered on 14.09.2010 at p 9 para [13]:

> *"The Court will not decide issues which are academic, abstract, or hypothetical."*

See also: *Mushwena v Government of the Republic of Namibia (2),* 2004 NR 94 at 102H-I, para [21].

[12] Although this Court has a discretion to grant leave to appeal against interlocutory judgments and orders, this discretion must be exercised judicially and as far as it concerns the present instance, it would not, at this juncture, be in the interest of the administration of justice to seek clarity from the Supreme Court on undecided issues before the High Court.

[13] Mr. *Chaskalson,* furthermore submitted that the legal issue is *res nova* in this jurisdiction and therefore, *per se,* would strongly militate in favour of the granting of leave to appeal as it is an issue on which a ruling of the Supreme Court is desirable. In his view, the only way in which this important issue could reach the Supreme Court is by means of leave to appeal against an interlocutory order. Enticing as the argument might appeal to this Court in the absence of case law on point, I am not persuaded that, hence, leave to appeal should be granted. Once the review proceedings have been finalised, the need *might* arise to appeal against an order of the Court and I fail to see why the appeal at that stage cannot include a ruling made by the Court during interlocutory proceedings. At that stage the Court of Appeal would have all the facts before it and hence, in the best position to decide the matter -contrary to the present situation where the last word has not been spoken on the issues in dispute.

[14] Another reason advanced as to why leave to appeal should be granted is that, when regard is had to the particular facts of the present case, a denial of leave to appeal would not prevent the issue from interrupting the proceedings again before another Court (during review proceedings), as the order is interlocutory in nature and thus open for reconsideration at a later stage of the proceedings. Such interruption, it was argued, could be avoided by granting leave to appeal and to have the issue on discovery decided by the Supreme Court.

[15] Despite applicant's anticipation of a similar interlocutory application, based on the same facts, being made later; which undoubtedly would interrupt the review proceedings, I am - for the reasons mentioned above - not persuaded in granting leave to appeal for any other reason advanced on behalf

of the applicant.

[16] In the result, the following order is made:

1. The application for leave to appeal is dismissed with costs.
2. Costs to include one instructing and one instructed counsel.

LIEBENBERG, J

COUNSEL FOR THE APPLICANT:	**ADV. CHASKELSON, SC**
INSTRUCTED BY:	**DU PISANI LEGAL PRACTITIONERS**
COUNSEL FOR THE RESPONDENT:	**ADV. MALEKA, SC**
INSTRUCTED BY:	**GOVERNMENT ATTORNEY**