

SOUTH AFRICA / JUDGMENT

## Ewels v Francis and Others (Leave to Appeal) (6497/2022) [2025] ZAWCHC 113 (17 March 2025) [2025] ZAWCHC 113

COURT

Western Cape High Court, Cape Town

BEFORE

S G Magardie

CASE / FILE NUMBER

6497/2022

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### Source record

IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN

Case

Number: 6497/2022

In

the matter between:

STEVEN

ERIC EWELS

Plaintiff

/ Respondent

and

ZOE

FRANCIS

First

Defendant / Applicant

GLENNS

LOCK CC

Second

Defendant

EVELYN

JOHAN PATRICK

Third

Defendant

**JUDGMENT****(LEAVE TO APPEAL)****MAGARDIE AJ**

1. This is an application for leave to appeal against the judgment and order of this Court handed down on 21 November 2024 (“the order”). The order dismissed with costs an application by the Applicant to compel further and better discovery in terms of Rule 35(7) of the Uniform Rules. The Respondent opposes the granting of leave to appeal.
2. Two main issues arise for determination. The first is whether the order is appealable. The second is whether an appeal would have reasonable prospects of success, even were the order to be appealable.

**Appealability**

3. This Court may only grant leave to appeal if the order sought to be appealed is a “decision” within the meaning of section

16(1)(a) of the Superior Courts Act 10 of 2013 (“Superior Courts Act”).<sup>[1]</sup> There is no difference between the meaning of the term “decision” in section 16(1)(a) of the Superior Courts Act and the phrase “judgment or order” in section 20 of repealed former Supreme Courts Act 19 of 1959. In *Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others*<sup>[2]</sup>, Coppel AJA (as he then was) stated:

*“If a decision did not constitute a ‘judgment or order’ the decision was not appealable under the Supreme Court Act. Since there is no conceptual difference between such a judgment or order and the ‘decision’ contemplated in s 16(1)(a) of the Superior Courts Act, the same would hold true under the Superior Courts Act. The ‘judgment or order’ was held to refer to a substantive judgment or order in terms of which the court granted or refused the relief sought. The same meaning has to be given to the ‘decision’ contemplated in s 16(1)(a) of the Superior Courts Act.”*

**Prospects of success**

41. I shall deal briefly with the prospects of success on appeal, in the event that I am wrong regarding the appealability of the order. The application for leave to appeal is prolix and consists of some 72 paragraphs spanning over 36 pages. I do not intend addressing each and every one of the professed grounds of appeal. A number of these grounds relate to the Court’s reasons for its order as opposed to the order itself. The purpose of an application for leave to appeal is furthermore not an opportunity for parties to rehash and traverse again the well-worn pathways of the merits of the matter.

**Relevance**

42. I concluded in my judgment that the Applicant had failed to demonstrate the relevance of item 6 and item 7 (lists of clients and suppliers), item 8 (PSIRA registration documents), item 10 and 11 (documentation relating to Plaintiff's employees) and item 12 to 14 (Plaintiff's financial statements, credit applications and bank statements) of the Applicant's Rule 35(3) Notice.
43. The main submission advanced by the Applicant in respect of the Court's findings on the relevance of these items, is that in so finding, the Court erred by limiting facts and circumstances relevant to the exercise of the trial judge's discretion and has tied his/her hands in this regard. Additionally, it was submitted that the judgment limits the evidence to which the Applicant will have access to demonstrate the matters pleaded by her.
44. I have already dealt earlier with these submissions. They are without merit. I repeat that a determination by this Court on a pre-trial interlocutory discovery application, can on no sustainable basis be construed as a final determination of legal and factual issues pending before the trial court, which has not even begun to hear the evidence. It is furthermore untenable for the Applicant to contend on the one hand, that the trial court enjoys a wide unfettered discretion to make any just and equitable order under section 89(5) of the NCA, yet on the other, that this Court's judgment in a pre-trial discovery motion ties the hands of the trial court in advance.
45. The determination by Courts of the disputes concerning relevance of documents in pre-trial applications to compel discovery, is par for the course. It can hardly be suggested that Courts determining such pre-trial applications and the relevance of disputed documents, thereby make final and determinative pronouncements on issues between the parties, which are binding on the trial court.
46. Item 6 and 7 of the Rule 35(3) Notice sought discovery of lists of the Respondent's and Evolution Supply Chain (Pty) Ltd trading as Vengeance Security Solutions' ("the company"), clients and suppliers from 23 September 2019 to the date of the Notice in April 2024. I am not persuaded that there are reasonable prospects of another Court concluding that the Respondent's lists of clients and suppliers at April 2024 are relevant to the Applicant's claim for an order under section 89(5) of the NCA in respect of an agreement concluded in 2019 and cancelled on 2 alternatively 9 December 2021.
47. The wide and unfettered discretion of a court under section 89(5) of the NCA is a discretion which can only be exercised judicially with regard to relevant evidence. Relevant evidence does not mean any evidence.
48. Item 8 of the Rule 35(3) Notice sought the Respondent's and the company's Private Security Industry ('PSIRA') registration applications. Item 9 sought all written and electronic communication between representatives of PSIRA, the Respondent and any representatives of the company from September 2019 to the date of the Notice. At paragraph 63 of the judgment, I concluded that the allegation by the Applicant in her founding affidavit in the application to compel, that the Respondent was not registered to provide security services

and represented that he was registered to offer services for which he was not PSIRA registered, was false. The Applicant contended that this factual finding was wrong and binding on the trial court.

49. The Respondent has discovered the PSIRA registration documents relating to himself and the company. He states under oath that he has nothing more to discover in this regard. The Applicant in effect seeks proof that there were no earlier registration certificates. This would however be evident from the Respondent's statement under oath that he has no further PSIRA registration documents other than those discovered. The generalized allegation by the Respondent that the Plaintiff provided security services when he was not registered, was in my view not established on the evidence and is contradicted by the documents discovered by the Respondent.
50. There are in my view no reasonable prospects of another Court going behind the Respondent's affidavit regarding the PSIRA documents or concluding that the requested PSIRA documents, which the Respondent says do not exist and are not in his possession, are relevant to an unlawful competition claim properly brought by the Applicant. The same applies to the additional documents which were sought in the application to compel further discovery and which the Respondent states under oath that he is not in possession of.
51. Items 10 and 11 of the Rule 35(3) Notice sought a broad range of documents relating to the Respondent's employees. The primary basis on which further and better discovery of these documents was refused, was due to the manifestly overbroad formulation of the description of the documents sought. I consider there to be no prospects of another Court concluding that the documents sought in items 10 and 11 of the Rule 35(3) Notice, were not overbroad and complied with the degree of specificity required by the rule.
52. The Applicant bore the onus of establishing that the documents sought in her Rule 35(3) Notice were relevant. A factual basis demonstrating relevance is required. Merely submitting in an affidavit, as the Applicant did in relation to item 14 of the notice, that the required documents are "relevant and sufficiently particularized", does not assist.

#### Overbroad description of the documents

53. The judgment concluded that the description of the items sought in paragraphs 3, 4, 5, 10 and 11 of the Rule 35(3) Notice were manifestly overbroad. Mr. Kulenkampff submitted that the wide formulation and broadness by which the medium or format

of the items sought was described, is as a result of the "significant explosion of methods of communication which are now available in the modern world." It was further submitted that the medium or format in which the documents are held does not prejudice the Respondent because he "...knows or should know in what mediums or formats he communicates or holds records."

54. The Applicant's submissions proceed from an incorrect premise. Overbroad requests for discovery are not justified by the wide variety of electronic mediums and formats in which information and documents are stored.
55. On the contrary, it is precisely because of the greater use of electronic communication that Courts are required to be alert to

guard against potential abuse of the discovery process through unspecific and overbroadly formulated demands for discovery. As Spilg J explained in *Makate v Vodacom*[38]:

*"The greater use of electronic documentation ("e-documents") whether as a means of communication (such as e-mails) or as a means of storing information (such as computer databases or central servers) exacerbates the risk of potential abuse. The issue has received the attention of many jurisdictions and has spawned specialist in the field of discovery (or disclosure) of electronic material. Lord Jackson in his Review of Civil Litigation Costs (Preliminary Report) of May 2009 vol 2 at para 1.1 (which was prepared at the request of the Master of the Rolls) summed it up as follows:*

'the existence of a vast mass of electronic documents presents an acute dilemma for the civil justice system. On the one hand, full

disclosure of all electronic material may be of even greater assistance to the court in arriving at the truth than old style discovery of documents. On the other hand, the process of retrieving, reviewing and disclosing electronic material can be prodigiously expensive. Certain short cuts are available, such as the use of keyword searches. However, the sheer volume of potentially disclosable electronic material which is now generated in the course of a project means that disclosure is now becoming an even more expensive process than formerly.'

## Conclusion

56. Section 17(1)(a)(i) of the Superior Courts Act provides that leave to appeal may only be granted if an appeal would have a reasonable prospect of success.
57. The Applicant has not suggested that there are compelling reasons why an appeal should be heard as contemplated by section 17(1)(a)(ii) of the Act. I see none. The application for leave to appeal does not raise any significant questions of law or issues of public importance that may have a bearing on future disputes.
58. I have carefully considered the Applicant's grounds of appeal. I am unpersuaded that another Court would reasonably arrive at a different conclusion, even were the order to be appealable.

## Order

59. The application for leave to appeal is dismissed with costs, such to include the costs of two counsel where so employed, to be taxed on scale C.

S G MAGARDIE

Acting Judge of the High Court

Western Cape Division

## APPEARANCES

For Applicant / First Defendant: D Kulenkampff

Instructed by:

Kulenkampff & Associates

For Respondent / Plaintiff: R Stelzner SC

Hannes Pretorius, Bock & Bryant

Date of hearing: 21 January 2025

Date of judgment: 17 March 2025

- [1] Section 10 of the Superior Courts Act: “Subject to section 15(1), the Constitution and any other law- (a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted...”
- [2] Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others (605/2016) [2017] ZASCA 47 (31 March 2017) (“Neotel”).
- [3] Zweni v Minister of Law and Order [1992] ZASCA 197; 1993 (1) SA 523 (A) (“Zweni”).
- [4] Zweni at 532J–533A.
- [5] Philani-Ma-Afrika & others v Mailula & others [2009] ZASCA 115; 2010 (2) SA 573 (SCA) at para 20 ; City of Tshwane Metropolitan Municipality v Afriforum and Another ( ; 2016 (9) BCLR 1133 (CC) at para 40.
- [6] International Trade Administration Commission v SCAW South Africa (Pty) Ltd [2010] ZACC 6; 2012 (4) SA 618 (CC) at para 55.
- [7] TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd 2023 (5) SA 163 (SCA) (“TWK Agriculture”).
- [8] TWK Agriculture at para 20.
- [9] TWK Agriculture at para 30.
- [10] HJ v PJ [2024] ZASCA 55 (19 April 2024).
- [11] HJ v PJ at para 10.
- [12] HJ v PJ at para 16.

- [13] Minmetals Logistics Zhejiang Co Ltd v The Owners and Underwriters of the MV Smart and Another (573/2023) [2024] ZASCA 129; [2025] 1 All SA 60 (SCA); 2025 (1) SA 392 (SCA) (1 October 2024) (“Minmetals”).
- [14] Minmetals at para 32.
- [15] Government of the Republic of South Africa v Von Abo [2011] ZASCA 65; 2011 (5) SA 262 (SCA) at para 17 (“Von Abo”).
- [16] Eskom Holdings Soc Ltd and Another v Sonae Arauco (Pty) Ltd (1018/2023) [2024] ZASCA 177 (18 December 2024) at paras 35 – 37.
- [17] Von Abo at para 17.
- [18] United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others 2023 (1) SA 353 (CC) at para 41 (“Lebashe”).
- [19] Lebashe at para 41.
- [20] Santam and Others v Segal 2010 (2) SA 160 (N).
- [21] M v M A3062/14, RC/GP/Pal 464/2013) [2014] ZAGPJHC 295 (31 October 2014).
- [22] Taskflow (Pty) Ltd v Aluxium (Pty) Ltd and Others (Leave to Appeal) (2021/40976) [2024] ZAGPPHC 1294 (25 October 2024).
- [23] Zweni at para 13.
- [24] Democratic Alliance v Brummer (793/2021) [2022] ZASCA 151 (3 November 2022) at para 13.
- [25] MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co Ltd [2008] ZASCA 21; 2008 (3) SA 585 (SCA) at para 9
- [26] Cronshaw and Another v Coin Security Group (Pty) Ltd (410/94) [1996] ZASCA 38; 1996 (3) SA 686 (SCA) at para 6 – 8.
- [27] Zweni at para 14.
- [28] Neotel at para 23.
- [29] Santam and Others v Segal supra fn 20 (“Santam”).
- [30] Santam, at para 7.
- [31] M v M supra fn 21.
- [32] HJ v PJ at para 10.
- [33] Taskflow (Pty) Ltd v Aluxium (Pty) Ltd and Others (Leave to Appeal) (2021/40976) [2024] ZAGPPHC 1294 (25 October 2024) (“Taskflow”).

[34] Taskflow at para 12.

[35] TWK at para 36.

[36] Guardian National Insurance Company Ltd v Searle NO (195/97) [1999] ZASCA 3; [1999] 2 All SA 151 (A) (1 March 1999).

[37] Zweni at para 14.

[38] Makate v Vodacom (Pty) Ltd (2011/07680) [2011] ZAGPJHC 241; 2014 (1) SA 191 (GSJ) (18 November 2011).

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Prepared on 12 October 2026 · Esheria