



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

25/10/24



CASE NO:2021/40976

In the matter between: -

TASKFLOW (PTY) LTD

Applicant/Respondent
in Leave to Appeal

and

ALUXIUM (PTY) LTD

First Respondent/First applicant
in Leave to Appeal

ANDRE DE KOCK

Second Respondent/Second applicant

in Leave to Appeal

CHRISTIAN DAVID FRISCHE

Third Respondent/Third Applicant

in Leave to Appeal

This judgment was handed down electronically by circulation to the parties' legal representatives via email and by uploading it to the electronic file of this matter on Caselines. The date of judgment is deemed to be 25 October 2024.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

BEFORE MOGAGABE AJ

INTRODUCTION

- [1] This is an application by the applicants (respondents in the main application), for leave to appeal against my judgment and order so delivered on 26 August 2024. The application for leave to appeal is premised on the grounds set out therein,¹ and comprehensively elaborated upon in its heads of argument.² There is no need to rehash same.

¹ Caselines A1 – A5

² Caselines A43- 59.

- [2] The respondent, (the applicant in the main application), is opposing the application for leave to appeal, on the grounds set out in the heads of argument filed on its behalf in so resisting the application for leave to appeal.³
- [3] Applications for leave to appeal are governed by the provisions of sec 17(1) of the Superior Court Act 10 of 2013 (the Act). In terms of sec 17(1)(a)(i)(ii) of the Act, leave to appeal will only be granted when the Judge or Judges concerned is/are of the opinion that the appeal would have a reasonable prospect of success or there is other compelling reason(s) why the appellate court should hear the appeal, entailing in contrast to the position that prevailed under the repealed Supreme Court Act of 1959, that the test has become stringent, requiring a measure of certainty that an appellate court would on the facts and the law reach a different conclusion on the judgment and order so appealed against. In other words, leave to appeal should be granted only where an applicant has demonstrated and the court is convinced that there exists a sound and rational basis for the conclusion that there are prospects of success on appeal. ⁴
- [4] Prior to dealing with the merits of the application for leave to appeal, I need to deal with the issue of the appealability of the discovery order I gave directing or compelling the applicants to discover inter alia its computer software

³CaseLines A61- A76

⁴ Mont Chevaux Trust v Goosen 2014 JDR 2325 (LCC); MEC for Health, Eastern Cape v Mkitha [2016] ZASCA 176 para 17; S v Smith 2012 (1) SACR 597 (SCA) para 7.

programme and software as listed in the Rule 35(3) Notice dated 14 April 2023,⁵ as per the order so foreshadowed in paragraph 40 of my judgment.⁶

APPEALABILITY OF THE ORDER

[5] Counsel for Taskflow asserted that the discovery order that I issued forming the subject matter of the present application for leave to appeal, is an interlocutory order and as such is not appealable, entailing that the application for leave to appeal should be dismissed on this score, without the need to consider or traverse the merits of the application for leave to appeal. For the reasons set out hereafter, I disagree.

[6] In support of such contention or assertion, counsel for Taskflow relies, notwithstanding recent or latest jurisprudential developments on this aspect, on the well-known case of **Zweni v Minister of Police**.⁷ In developing this argument, counsel for Taskflow placed particular emphasis on the fact that the order I issued lacked two of the triad of the **Zweni** attributes for the order to be appealable, namely, that it is not definitive of the rights of the parties and does not have the effect of disposing of at least a substantial portion of the relief claimed in the trial action.

⁵ CaseLines 0011- 91 to 0011-93 annexure "CN 12" to founding affidavit.

⁶ CaseLines O-22 to O-23

⁷ 1993 (1) SA 523 (A).

[7] In **Zweni Harms** AJA held that for a court order to be appealable, it must have three attributes: (a) the decision or order should be final in effect and not susceptible to alteration by the court of first instance; (b) it must be definitive of the rights of the parties, i.e. it must grant definitive and distinct relief and (c) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.⁸

[8] However, it is important to highlight the fact that the **Zweni** triad of attributes for an interim order to be an appealable order, is no longer rigid or cast in stone, nor exhaustive, and has been refined or rendered flexible by the recent developments in our jurisprudence, in accordance with the overarching principle of “the interests of justice”. This entails that the interests of justice criterion is now the overarching test or standard in deciding whether interim orders, including interlocutory orders, are appealable. As to what constitutes the interests of justice, requires careful balancing and weighing up of all relevant factors.

[9] These developments in our jurisprudence have been aptly summarised by the Constitutional Court in **Tshwane City v Afriforum**:

“Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion

⁸ **Zweni** pp532J-533.

*of the relief claimed in the main application. All this is now subsumed under the constitutional interest of justice standard. The overarching role of interest of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability ... if appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest ...*⁹

- [10] The interest of justice test has been explained further by the Constitutional Court in **Lebashe** as follows:

*“In deciding whether an order is appealable, not only the form of the order must be considered, but also, and predominantly, its effect. Thus, an order which appears in form to be purely interlocutory will be appealable if its effect is such that it is final and definitive of any issue or portion thereof in the main action. By the same token, an order which might appear, according to its form, to be finally definitive in the above sense, may nevertheless, be purely interlocutory in effect.”*¹⁰

- [11] It is important to highlight that in terms of such jurisprudential developments, the emphasis has now moved from an enquiry focused on the nature of the

⁹ [2016] ZACC 19; 2016 (6) SA 279 (CC) at para [40]-[41].

¹⁰ **United Democratic Movement and Ano v Lebashe** [2022] ZACC 34; 2023 (1) SA 353 (CC) para [41].

order to the nature and effect of the order, having regard to what is in the interests of justice. The determination of what is “in the interests of justice”, depends on the facts of a particular case. Such standard applies both to appealability and the grant of leave to appeal, irrespective of what the pre-Constitutional common law impediment that might exist.¹¹

- [12] In applying these legal principles to the facts of the present matter, I am of the considered view that the order that I issued is in the circumstances appealable, for the following reasons. First, the judgment and order make final pronouncements regarding compelling discovery by the applicants, of inter alia its computer software programme relevant to the determination by the trial court whether same constitutes an infringement (adaptation or reproduction) of Taskflow’s computer software programme. Second, the decision or order has final effect and is definitive of the rights of the parties in that same is not susceptible to alteration by the trial court when adjudicating the trial action. Third, the nature and extent or broadness of the order, more particularly compelling the applicants to discover further computer programs and software as set out or so sought in paragraphs 2 and 3 as foreshadowed in the Notice in terms of Rule 35(3) dated 14 April 2023, which have no relevance or reference to the pleadings i.e the particulars of claim herein, dictate that the order should nevertheless be appealable in the interests of justice. This, in my view,

¹¹ *Jacobs & Others v Baumann NO & Others* [2012] JOL 23549 (SCA) para 7; *National Commissioner of Police & Another v Gun Owners of South Africa* [2020] ZASCA 88; 2020 (6) SA 69 (SCA) para [15].

constitutes a compelling reason, persuading me that in the “interests of justice” the discovery order is appealable.

[13] Accordingly, I am satisfied that despite my order lacking in one of the triad of attributes stated in **Zweni**, and on the basis of the jurisprudence of the Supreme Court of Appeal and Constitutional Court as outlined above on the appealability of interim/interlocutory orders¹², I conclude that the interests of justice render my order appealable. I turn now to deal with the merits of the application for leave to appeal.

[14] Having considered the applicants' grounds of appeal and having given due, careful and proper consideration to all the submissions made by the parties, I am of the considered view that a proper case has been made by the applicants, establishing that there are not only reasonable prospects that another court will come to a different conclusion on the facts and the law but also that there are compelling reasons for leave to appeal to be granted, and thus there is a sound and rational basis for the conclusion that there are prospects of success on appeal, on one or more of the legal issues raised by the applicants.

[15] In the result, leave to appeal is granted against my judgment and order.

¹² See also *National Treasury and Others v OUTA and others* 2012 (6) SA 223 (CC); *MEC for Economic Development v Vilakazi and Others* [2024] ZASCA 126 (17 September 2024) paras 21-25; *Minmetals Logistics Zhejiang Co Ltd v The Owners and Underwriters of the MV Smart* [2024] ZASCA 129 (1 October 2024) paras 29-32.

[16] Accordingly, I make the following order:

16.1. Applicants are granted leave to appeal against my judgment and order to the Full Court of this division;

16.2. Costs of the application for leave to appeal shall be costs in the appeal.



S J R MOGAGABE AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Counsel for the applicants/defendants: P Cirone

Instructed by Spoor & Fischer Attorneys

Counsel for respondent/plaintiff: R Michau SC and P P Ferreira

Instructed by Charl Naude Attorneys

Date of hearing: 21 October 2024

Date of Judgment: 25 October 2024