



**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”).¹ 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the term “decision” in section 16(1)(a) of the Superior Courts Act and the phrase “judgment or order” in section 20 of repealed former Supreme Courts Act 19 of 1959.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*², Crippin 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

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”).

same meaning has to be given to the 'decision' contemplated in s 16(1)(a) of the Superior Courts Act."

4. It is common ground that this Court's order dismissing the Applicant's application for further and better discovery is an interlocutory order in pending action proceedings. The trial of the Respondent's claim in those proceedings and the Applicant's claim in reconvention, is yet to commence. Interlocutory orders or rulings of the nature sought to be appealed in this matter were traditionally considered non-appealable by virtue of their inconsistency with the "triad of attributes for appealability" determined in *Zweni v Minister of Law and Order*.³ Following a comprehensive review of the authorities, Harms AJA (as he then was) said the following:

"In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears 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."⁴

5. The advent of the Constitution has however significantly impacted on the common law requirements for appealability of orders established in *Zweni*. The classification of an order as "interim" or "interlocutory" is no longer regarded as either exhaustive or determinative of its appealability. The constitutionally required standard is instead whether an appeal against an interlocutory or interim order would be "in the interests of justice". The common law test for appealability articulated in *Zweni* is thus no longer decisive, irrespective of any other considerations. The Constitutional Court has held that the interests of justice

³ *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) ("*Zweni*").

⁴ *Zweni* at 532J–533A.

standard relativizes the final effect of the order or the disposition of the substantial portion of what is pending before the court, in determining appealability.⁵

6. The application of the interests of justice standard is a fact specific enquiry involving a careful balancing and weighing up of all relevant factors.⁶
7. In *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd*⁷, the Supreme Court of Appeal however confirmed that the *Zweni* triad remains relevant and has not been supplanted by the development of our jurisprudence. The interests of justice standard, the Court held, must also be considered in the context of two other principles, legal certainty and finality in litigation, which are themselves key components of the rule of law. Unterhalter AJA observed that "...courts should be cautious to adopt standards for their decisions so porous that a litigant cannot be advised, with any reasonable probability, as to the decision that a court is likely to make."⁸ The learned Judge went on to say the following:

"I do not here essay a general account of appealability. I do affirm, though, that the doctrine of finality must figure as the central principle of consideration when deciding whether a matter is appealable to this Court. Different types of matters arising from the high court may (I put it no higher normatively) warrant some measure of appreciation that goes beyond *Zweni* or may require an exception to its precepts. Any deviation should be clearly defined and justified to provide ascertainable standards consistent with the rule of law.

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.

Recent decisions of this Court that may have been tempted into the general orbit of the interests of justice should now be approached with the gravitational pull of *Zweni*.⁹

8. It was urged by Mr. Kulenkampff, who appeared on behalf of the Applicant, that the Supreme Court of Appeal has in a number of judgments developed the *Zweni* test for appealability in line with the interests of justice standard. The argument is in general terms correct. It does not however take full account of the continued importance of the *Zweni* attributes of an appealable order and the circumscribed application of the interests of justice standard cautioned in *TWK Agriculture* and a number of judgments of the Supreme Court of Appeal handed down subsequent thereto.
9. In *HJ v PJ*¹⁰, a judgment delivered on 19 April 2024, the Supreme Court of Appeal warned against Courts other than the Constitutional Court adopting the standard of the interest of justice as the foundational basis upon which they decide whether the matter is appealable or not.¹¹ Notably, *HJ v PJ* concerned an appeal against an interlocutory discovery order compelling the delivery of further particulars for trial. Kgoele JA held that the High Court had erred in entertaining the appeal as it was in relation to a discovery order which was purely interlocutory, lacked final effect and was consequently not appealable.¹²
10. Six months later and in *Minmetals Logistics Zhejiang Co Ltd v The Owners and Underwriters of the MV Smart and Another*¹³, the Supreme Court of Appeal again emphasized the avoidance of piecemeal litigation and continued relevance of the *Zweni* triad. Koen AJA said:

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*”).

“If one of the attributes in *Zweni* is lacking, an order will probably not be appealable, unless there are circumstances which in the interests of justice, render it appealable. The emphasis has moved from an enquiry focused on the nature of the order, to one more as to the nature and effect of the order, having regard to what is in the interests of justice.’

It is not in the interest of justice to have a piecemeal adjudication of litigation, with unnecessary delays resulting from appeals on issues which would not finally dispose of the litigation. As the Constitutional Court has held, albeit in a different context, it is undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance, and an appellate court will only interfere in pending proceedings in the lower courts in cases of great rarity – where grave injustice threatens, and, intervention is necessary to attain justice.”¹⁴

11. The present approach to appealability as it emerges from *Government of the Republic of South Africa v Van Abo*¹⁵, applied most recently by the Supreme Court of Appeal in *Eskom Holdings Soc Ltd and Another v Sonae Arauco (Pty) Ltd*¹⁶ may be summarized thus:

“It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.”¹⁷

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.

12. As to whether the relief granted was final in nature, it was held by the Constitutional Court in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*¹⁸, that the form of the order and predominantly, its effect must be considered when deciding whether an order is appealable. An order which in form appears to be purely interlocutory, may nonetheless be appealable if its effect is such that it is final and definitive of any issue or portion thereof in the main action.¹⁹
13. The order in the present instance is an interlocutory order dismissing an application for further and better discovery in pending action proceedings where the trial has yet to commence. Counsel for the Applicant, in his heads of argument, did not submit that the order was final in effect, definitive of the rights of the parties, that it disposed of a substantial portion of the relief claimed and thereby met the triad of attributes of an appealable order articulated in *Zweni*. It was instead submitted that the order was appealable under the broad rubric of “interests of justice”, for a variety of reasons relating to what was argued to be the prejudicial effects of the order. Relying on *Santam v Segal*²⁰, *M v M*²¹ and *Taskflow (Pty) Ltd v Aluxium (Pty) Ltd and Others*²², it was contended by the Applicant that discovery orders have been recognised to be appealable in the interests of justice.
14. I will deal first with the submission that the effect of the order was to incorrectly limit and exclude evidence which the trial court hearing the Applicant’s claim in reconvention would be entitled to take into consideration. The evidence excluded by the order, so the argument went, was relevant to the exercise of the trial court’s discretion in terms of section 89(5) of the National Credit Act (“NCA”) to grant the relief sought in the Applicant’s claim in reconvention in the main action.

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).

15. The proposition is unsustainable. The order is not definitive of the issues arising in the main action nor does it limit the discretion vested in the trial court to consider any argument or evidence which the Applicant may wish to advance regarding the relief she seeks under section 89(5) of the NCA. That the dismissal of the application to compel further and better discovery *may*, and I would put it no higher than that, inconvenience the Applicant in later leading certain evidence at the trial, is not a sustainable ground on which to grant leave to appeal. As Harms AJA said in *Zweni*:

“The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the 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.”²³

16. The next submission advanced by the Applicant was that “certain” of the Court’s findings in the judgment were *res judicata* and binding on the trial court. Precisely which findings were being referred to, was not explained in any detail. That aside, the argument is wrong. It misapprehends the principle of *res judicata*.
17. A central requirement for the operation of the principle of *res judicata* is that it must be the same issue of fact or law determined by the judgment of the previous court or earlier, that arises before a later court for determination. If the same issue was not not determined by the earlier court, an essential requirement for the operation of *res judicata* has not been met.²⁴ The question is always what issue of fact or law was decided by the court in the earlier proceedings and was it finally decided.²⁵

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

The decision of the earlier court can only support a finding of res judicata if it was a final and definitive judgment on issues arising before the later court.²⁶

18. The issue before this Court was whether the Applicant had made out a proper case for the Court to exercise its discretion to enforce discovery of the documents listed in the First Defendant's Rule 35(3) Notice. The exercise of that discretion is based on an assessment of whether the Applicant had demonstrated inter-alia that the documents she sought, were relevant. In addition, the issues before the Court related to whether the description of the documents sought by the Applicant were overbroad and whether a proper case had been made out for the Court to go behind the Respondent's discovery affidavit.
19. In determining a pre-trial application for further and better discovery in terms of Rule 35(7), a Court does not thereby don the garb of a sage prophesying the eventual outcome of the trial. As Harms AJA put it "...a court is not called upon to speculate upon or divine (with or without the assistance of the parties) the ultimate effect of its decision on the course of the litigation."²⁷
20. The order sought to be appealed is a pre-trial discovery ruling. Such a ruling does not finally dispose of any issues of law or fact falling within the remit of the trial court nor does it render such issues res judicata. To the extent that the Applicant's real complaint is about the Court's findings and reasons for the order, the position is trite that appeals do not lie against the reasons for a judgment or order.²⁸ The Applicant's res judicata point has no merit.
21. The authorities relied on by the Applicant take the matter no further. In *Santam and Others v Segal*²⁹, a full court of the Natal Provincial Division held that a dismissal of an application to compel further discovery had been finally

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").

determinative of the party's rights in that case and was therefore appealable. The case was decided some 14 years before the recent judgments of the SCA in *TWK Agriculture*, *Minmetals* and *HJ v PJ* affirming the continued relevance and import of the *Zweni* triad of attributes of an appealable order.

22. *Santam* is not authority for a general proposition that interlocutory discovery orders are appealable. That Court indeed made it clear that each case would have to be judged on its own facts and that it was not laying down an immutable rule that all all orders refusing or compelling discovery are necessarily appealable.³⁰
23. *M v M*³¹ dealt with an appeal against a Regional Court's interlocutory order refusing an application for further discovery in terms of Rules 23(3), 23(6) and 23(8) of the Magistrates' Courts Rules in a pending divorce action. The Court, per Moshidi J and Kennedy AJ concurring, held that in the particular circumstances of the case, the interlocutory order was appealable.
24. The judgment in *M v M* was also delivered well before the recent judgment of the Supreme Court of Appeal in *HJ v PJ*, where in very similar circumstances involving an appeal against the granting of a regional court's order compelling discovery in a pending divorce action, the SCA held that such an order was purely interlocutory and not appealable.³²
25. *Santam* and *M v M*, decided as they were a decade before *HJ v PJ* and *TWK Agriculture*, are in my view and with respect, not entirely on par with the most recent jurisprudence of the Supreme Court of Appeal on the appealability of orders and the caution to High Courts regarding the circumscribed nature of the interest of justice standard. These judgments in any event turned on the specific and particular factual circumstances before those Courts.

³⁰ *Santam*, at para 7.

³¹ *M v M* supra fn 21.

³² *HJ v PJ* at para 10.

26. In *Taskflow (Pty) Ltd v Aluxium (Pty) Ltd and Others*³³, Mogogabe AJ granted leave to appeal against a discovery order compelling the discovery of computer software listed in a Rule 35(3) Notice. The Court held that although the order lacking one of the *Zweni* triad of attributes, the order was appealable in the interests of justice.
27. It is evident from the judgment in *Taskflow* that a central factor considered by that Court to be a compelling reason to grant leave to appeal in the interests of justice, related to the broadness of the order and that the order compelled the discovery of further computer programs and software which had no relevance or reference to the pleadings.³⁴
28. I consider *Taskflow* to have been decided on the unique facts of that particular case. The judgment is equally not authority for a general proposition that interlocutory discovery orders are appealable in the interests of justice.
29. In my view, the *Zweni* triad of attributes of an appealable order are signally absent in all three respects from the order which is the subject of this application for leave to appeal. The order is not final and definitive of any issue or portion thereof in the main action. Nor does it have the effect of disposing of any portion of the relief claimed in the main action, let alone a substantial portion thereof. The *Zweni* test for appealability not being satisfied, what remains to be considered is whether there are any other factors relevant to the interests of justice, that would tilt the scale in favour of the Applicant.
30. Mr. Kulenkampff submitted that the interests of justice and convenience would be served by allowing an appeal at this stage rather than after the judgment in the action. It was further submitted that the matter would be delayed less in the event that an appeal is heard at this stage rather than after judgment in the main action

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.

and a referral back to the court a quo, with adverse procedural and costs implications.

31. Mr Stelzner SC, who appeared for the Respondent, submitted that an appeal would achieve no practical effect or result. He argued that the trial court could, in the final result, ultimately find in favour of the Applicant. He submitted that the pre-trial processes should not be further protracted in order for the matter to be declared trial ready and proceed to court.
32. Mr. Stelzner further submitted that it would be open to the trial court, after hearing further evidence, to order discovery of some of the documents which on the current facts have been found to be not discoverable.
33. There is in my view no doubt that allowing an appeal at this stage will delay the pending trial of both the Respondent's claim in the pending action and the Applicant's claim in reconvention. An appeal solely on an interlocutory discovery ruling will stay the progress of the trial with no discernible advantage as the appeal will not finally dispose of the case, even if the Applicant ultimately succeeds on appeal. The matter would in that event simply be remitted to the trial court, possibly years from now, for the proceedings to recommence.
34. The trial court would then eventually hear from witnesses on contracts which were concluded and events which, at this stage, already took place some four and a half years ago. The sale of members agreement underlying the dispute and impugned by the Applicant as void, was concluded between the parties on 23 September 2019. As *TWK Agriculture* observes, trial delay not only atrophies due process, but its baleful effects also include the well-known risks regarding availability of witnesses and their diminished ability to recall distant events.³⁵

³⁵ TWK at para 36.

35. An appeal against the order will fragment the case and result in piecemeal appellate adjudication of an interlocutory discovery issue, which will not finally dispose of the litigation. There are sound and obvious policy considerations for the general rule discouraging piecemeal appeals, not the least of which are the conservation of limited judicial resources and the cost effective and expeditious disposal of litigation by the same court at the same time. The relaxation of this approach has been limited to judicial decisions which meet the *Zweni* triad of attributes of an appealable order.³⁶ As I have concluded earlier, the interlocutory discovery ruling sought to be appealed, lacks those attributes.
36. The Applicant contends that only an appeal at this stage will cure what it claims to be the prejudicial effect of the order. I fail to see how that would be so. It is well established that should it appear at the conclusion of a matter that a court's interlocutory ruling was not only incorrect but amounted to an irregularity which may have had a material effect on its outcome, a Court of Appeal may, in adjudicating the merits, set aside the final judgment on that ground and, in an appropriate case, remit it back to the trial Court.³⁷
37. I am furthermore in agreement with the Respondent's submissions that it would be open to the trial court, after hearing further evidence, to revisit the discovery of documents which this Court held not to be discoverable on the current facts. The trial court has a discretion to do so in terms of Rule 35(11), which permits the court to order, during the course of any proceedings, the production by any party under oath of documents in such party's power or control relating to any matter in question in such proceedings.
38. The Respondent submitted that nothing precludes the Applicant from filing a further notice requesting further and better discovery and a ruling thereon on another occasion. I agree. It can hardly be suggested that it is a foregone

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.

conclusion that such a further notice will suffer the same fate as its predecessor. More so, I would add, if care were taken to heed the basis on which the previous application for further and better discovery failed.

39. As I have pointed out earlier, a piecemeal appeal against the order will not bring finality to this litigation. The entire dispute between the parties remains pending and has not been resolved. I am unable to conclude that an appeal on an isolated issue relating to pre-trial discovery, would nonetheless lead to a just and prompt resolution of the real issues between the parties, as required by section 17(1)(c) of the Superior Courts Act.
40. The order sought to be appealed furthermore lacks the required attributes of an appealable decision as contemplated by section 16(1)(a) of the Superior Courts Act. The order does not involve the granting of an interim interdict or relief significantly prejudicing the Applicant's constitutional rights. No exceptional circumstances have in my view been demonstrated to grant leave to appeal in the interests of justice. On this basis as well, I would dismiss the application for leave to appeal.

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,

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

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
Instructed by:
Hannes Pretorius, Bock & Bryant

Date of hearing: 21 January 2025

Date of judgment: 17 March 2025