



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: 2025-057140

In the matter between:

DENEL SOC LTD

Applicant

and

ELIAS SELLO NTSIHLE

Respondent

Heard: In Chambers

Delivered: 13 January 2026

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

BHIMA, AJ

Introduction

[1] The applicant ('Denel') brought an interlocutory application to set aside (or dismiss) the respondent's application ('the main application') as an irregular step. The basis for this was, as contended by Denel, that it was impermissible to institute a claim under the Employment Equity Act, No. 55 of 1998 ('the EEA') by way of application.

[2] The application was argued before me on 12 September 2025, and judgment was thereafter delivered on 3 October 2025. In my judgment I dismissed

Denel's application on, *inter alia*, the basis that there was no rule of law that specifically excluded or prohibited the respondent's conduct, i.e., to proceed with his claim by way of motion. Denel now seeks leave to appeal against this judgment.

- [3] As is the practice in this Court, this application was adjudicated on the papers. Both parties were represented by counsel, and provided comprehensive written submissions on the matter.

The issues

- [4] To my mind, and as set out in the submissions on behalf of both parties, there are two issues that arise, namely:

- 4.1 whether my judgment/order is appealable; and
- 4.2 if so, whether the appeal would have a reasonable prospect of success or whether there is some other compelling reason why the appeal should be heard.

- [5] An answer in the negative to either one of the foregoing questions is dispositive of the application for leave to appeal.

Is the order appealable?

- [6] In determining whether the order made is appealable, the nexus is the test as espoused by Harms AJA (as he then was) in *Zweni v Minister of Law and Order*¹:

'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.**' (own emphasis)

- [7] However, in *Tshwane City v Afriforum and another*², Constitutional Court per Mogoeng CJ said:

¹ 1993 (1) SA 523 (A) at 536A-C.

‘The common-law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests 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.’

- [8] Of course, the court therein, as well as in *National Treasury and others v Opposition to Urban Tolling Alliance and others*³, were concerned with interim orders. Notwithstanding, in the words of Froneman J: “*It is by now settled law that the operative standard for determining whether leave to appeal should be granted is ‘the interests of justice’. That the order is temporary is not in itself determinative of whether the interests of justice call for leave to appeal to be granted.*”⁴
- [9] In *United Democratic Movement and another v Lebashe Investment Group (Pty) Ltd and others*⁵ Madonda AJ said:

‘What is to be considered and is decisive in deciding whether a judgment is appealable, even if the *Zweni* requirements are not fully met, is the interests of justice of a particular case and whether or not an order lacking one or more of the factors set out in *Zweni* constitutes a ‘decision’ for the purposes of s 16(1)(a) of the Superior Courts Act. Over and above the common-law test, it is well established that an interim order may be appealed against if the interests of justice so dictate. It is thus in the interests of justice that the impugned interim interdict is appealable on the allegation that the interdictory relief in question resulted in the infringement of the right to freedom of expression.’

² 2016 (6) SA 279 (CC) at 294 para 40.

³ 2012 (6) SA 223 (CC).

⁴ *Op cit* 2 at 307 para 83.

⁵ 2023 (1) SA 353 (CC) at 371 para 45.

[10] To my mind, the order dismissing Denel's application is not final in effect nor definitive of the rights of the parties, for the simple reason that the same issue raised by Denel in its application can be raised again in the main application. As such, the order may be subject to reconsideration by another court.⁶

[11] For the same reason, the interests of justice do not dictate that the order is appealable.

Would the appeal have a reasonable prospect of success?

[12] Even if I am wrong on that score; to my mind, the appeal would **not** have a reasonable prospect of success.⁷

[13] First, if the legislature intended to exclude motion proceedings or prescribe specific forms of proceeding in the EEA, it would have done so. The legislature further elected not define 'adjudication' under the EEA nor specify that adjudication in context would exclude motion proceedings. This election is telling; it can only mean that a party would be entitled to select the relevant process, but also that such party would bear the risk associated with the particular choice.

[14] Second, I do not read *Gibb v Nedcor Limited*⁸ ('*Gibb*') as authority for the proposition that the word 'adjudication' in the EEA, means that motion proceedings are excluded, or that process under section 10 of the EEA had to proceed by way of action. *Gibb* did not deal with the EEA at all.

[15] *Gibb* was concerned with whether or not the procedure in the CCMA after a private disciplinary inquiry was to be a review process or whether it should be on action. The facts in *Gibb* are entirely distinguishable from this matter.

[16] *O'Connor v Lexisnexis (Pty) Ltd*⁹ ('*O'Connor*') is the death knoll to Denel's case. As Meyerowitz AJ said therein:

⁶ See *Cash Crusaders Franchising (Pty) Ltd v Cash Crusaders Franchisees Listed on Annexure "ADP1" to the Founding Affidavit of Du Plooy* [2024] 2 All SA 49 (WCC) at para 52.

⁷ See *Seatholo and others v Chemical Energy Paper Printing Wood and Allied Workers Union and others* (2016) 37 ILJ 1485 (LC) at paras 2 & 3 for the appropriate test for leave to appeal.

⁸ [1997] 12 BLLR 1580 (LC).

⁹ (2024) 45 ILJ 1287 (LC).

'While a claim under section 6 of the EEA will normally proceed by way of trial under Rule 6, I see no reason why a litigant cannot approach this court on an urgent basis if the circumstances justify an urgent order. A good example is an urgent order setting in place restrictions on an employer so as to prevent an employee from being sexually harassed pending a trial for full and better compensation in due course.' (own emphasis)

[17] I agree that a claim under section 6 of the EEA, or for that matter one under section 10, will normally proceed by way of action; however, I see no reason why a litigant cannot approach the Court on motion if he so elects. Of course, the litigant will bear the risk if he elects to proceed by way of motion and material factual disputes arise.

[18] Accordingly, I cannot find that another court would come to a different conclusion than I have; and leave to appeal must be refused.

Is there some other compelling reason why the appeal should be heard?

[19] Denel also contends that leave to appeal should be granted in order for a Court clarify the alleged conflict between two decided cases: *Gibb* and *O'Connor*.

[20] There is however no conflict between the judgments. As set out hereinabove, *Gibb* does not deal with the EEA nor does it state that motion proceedings are excluded from 'adjudication'. *O'Connor* essentially states that motion proceedings can be used for claims under the EEA where appropriate.

[21] As such, there is no other compelling reason to grant leave in the circumstances.

Conclusion

[22] Having found in the negative to all of the questions posed hereinabove, the application must fail.

[23] The only remaining issue is the question of costs, taking into account the totality of circumstances I am of the view that costs should follow the event.

[24] In the premise, I make the following order:

Order

1. The application for leave to appeal is dismissed with costs.

R Bhima

Acting Judge of the Labour Court of South Africa