



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

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
<u>13/4/2026</u>	
DATE	SIGNATURE

CASE NO.: A139/2025

In the matter between:-

COLLEEN MICHELLE KUKARD N.O.

First Appellant

HILLBROW INN (PTY) LTD

Second Appellant

JOUBERT PARK MAXIME HOTEL (PTY) LTE

Third Appellant

MAXIME HOTEL (PTY) LTD

Fourth Appellant

NEW WORLD HOTELS (PTY) LTD

Fifth Appellant

JESHCO (PTY) LTD

Sixth Appellant

DREAM WEAVER TRADING 139 (PTY) LTD

Seventh Appellant

WARWIK PAUL VAN DEN BERG N.O.

Eighth Appellant

DARRYL HURWITZ N.O.

Ninth Appellant

v

ACCESS BANK OF SOUTH AFRICA LIMITED

First Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Second Respondent

Heard on: 11 March 2026

Delivered: 13 April 2026 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 13 April 2026.

Summary: The court *a quo* failed to make a decision in the interlocutory application (Rule 35(1)) – The appellants are bound to the grounds of appeal set out in the application for leave to appeal – It is inappropriate for the appeal court to be a court of first instance – The primary factor for consideration is the nature and effect of the order, having regard to what is in the interest of justice.

ORDER

It is ordered: -

1. The appeal is dismissed.
 2. The appellants are ordered to pay the costs of the first respondent on an attorney and client scale.
 3. The appellants are ordered to pay the costs of the second respondent on Scale C.
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JUDGMENT

KOOVERJIE J (Tolmay J and Francis-Subbiah J concurring)

The Appeal

[1] This is an appeal against the judgment and order of the court *a quo* where it was contended that the court erred in not granting the postponement and not furnishing a decision on the Rule 35(1) application of the Uniform Rules of Court.

Issue for determination

[2] The main issue for determination is whether it is appropriate for the appeal court to make a determination on the Rule 35(1) application.

Background

[3] In brief, the first appellant, Ms Kukard is the widow of the late Mr Kukard, who was during his lifetime, a director of the entities cited as the second to the seventh appellants in this matter.

[4] In the main, the appellants took issue with both, Access Bank and Standard Bank, for approving various loans in favour of the second to the seventh appellants.

The appellants' case essentially is that they had no knowledge of the respective loans granted by Access Bank and Standard Bank.

[5] According to the appellants' account, Mr Pillay, who served as financial manager at the time, independently approached Access Bank and Standard Bank for loans without informing Mr and Mrs Kukard. These loan applications were subsequently approved. When they discovered his fraudulent conduct, Mr Pillay was subjected to a disciplinary hearing on *inter alia* charges of dishonesty and was eventually dismissed from the appellants' employment. In the particulars of claim various negative allegations were levelled against Access Bank and Standard Bank pertaining to the loans granted.

[6] Access Bank and Standard Bank, upon receipt of the summons and particulars of claim, took exception thereto. Various fatal defects were identified in the appellants' particulars of claim which resulted in both parties filing their respective exceptions.

[7] The respondents approached the office of the Deputy Judge President to have the exceptions consolidated. At the meeting held with the Deputy Judge President, the appellants advised that they would be filing their Rule 35(1) discovery application as well. The Deputy Judge President then directed that both interlocutory applications, namely the Rule 35(1) application as well as the exceptions would be dealt with at the same time.

[8] Upon receipt of the said Rule 35(1) application, Access Bank made discovery of the relevant documents. It did so at least a month before the exceptions were heard. The appellants consequently withdrew the Rule 35(1) application against Access Bank but persisted with the application against Standard Bank.

[9] Access Bank takes particular issue with being dragged into these proceedings. It was pointed out that the appellants should have responded to Access Bank's

exception. Access Bank should not have been a party to the Rule 35(1) application or the postponement application.

[10] The appellants' request for early discovery was premised on the following basis, namely that the documents were required to prepare a damages claim against the respondents since proper pleadings cannot be prepared without them; the discovery was necessary to enable them to address the exceptions; the relationship between the appellants and Standard Bank justified early discovery; and since they were victims of fraud and theft, they required full disclosure.

[11] It is trite that for the appellants to succeed in their application for early discovery, exceptional circumstances had to be present and likewise pleaded. The general principle is that discovery is made after the close of pleadings.¹

Analysis

The grounds of appeal

[12] The court *a quo* dismissed the postponement application, upheld the exceptions and afforded the appellants 15 days to amend their particulars of claim; and ordered the appellants to pay the costs on Scale C.

[13] The appellants' notice of application for leave to appeal was confined to those portions of the judgment and order which refused the application for postponement of the exception proceedings and the court's failure to grant an order in terms of Rule 35(1) as well as the costs issue.

[14] Notably the court *a quo* also acknowledged that the appellants were not appealing the order pertaining to the exceptions and further that it had made no

¹ In *Regent Insurance Company Ltd v Flinkdink Transport and Another* [2015] ZAGPPHC 726 at para 34, where the court stated:

'No provision is made in the rules that discovery should take place before a party is required to plead. To the contrary an order that discovery be given before the close of pleadings, i.e. before a party has pleaded, will only be made where there are exceptional circumstances which requires such an order.'

decision in respect of the Rule 35(1) application. Consequently, it granted leave to appeal on the basis that there may have been a misunderstanding on its part for not making a finding on the said application.

[15] The appellants apparently expanded their appeal grounds. In their application for leave to appeal they did not seek to appeal the order upholding the exceptions, nor did they raise any grounds of appeal on the merits of the exceptions. The wide grounds they now intended to raise on appeal were the following:

- (a) the exceptions brought by Access Bank and Standard Bank (the third and the fourth respondents) be deferred for hearing until full and complete discovery by Standard Bank has been made;
- (b) Standard Bank be ordered to make discovery in terms of Rule 35(1);
- (c) the costs of the Rule 35 application and the costs of the exceptions be reserved for adjudication once discovery has taken place.

[16] Rule 49(1)(b) of the Uniform Rules of Court stipulates that a party seeking leave to appeal must set out the grounds of appeal in their notice. Such grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms. This is required to enable the court and the respondent to be fully informed of the case the appellants seek to make out and the respondents have to meet.

[17] The Appellate Division in *S v Sefatsa And Others*² stated that an appellant may only argue within the scope of the leave granted.

‘In my view, however, it requires to be emphasised that an appellant has no right to argue matters not covered by the terms of the leave granted. His only “right” is to ask this Court to allow him to do so.’

[18] The Supreme Court of Appeal endorsed this proposition in *Goosen and Others v Mont Chevaux Trust*:³

² *S v Sefatsa And Others* 1988 (1) SA 868 (A) at 887D-E.

³ *Goosen and Others v Mont Chevaux Trust* [2017] ZASCA 89 (6 June 2019) para 17.

'The appeal to this court, however, is subject to all the limitations applicable to appeals. The appeal is, for instance, limited to the grounds that were raised in the notice of appeal, must be decided only on the appeal record.'

[19] It was therefore not permissible for the appellants to advance grounds that were not included in the leave to appeal. In any event, the additional relief sought, namely to defer the exceptions, has its own problem. The exceptions were ventilated before the court a quo and an order and judgment upholding the exceptions were granted. The exceptions can therefore not be deferred as there remains nothing to postpone.

Failure to determine Rule 35(1) application

[20] The court a quo furnished two judgments, namely the main judgment and the judgment relating to the application for leave to appeal. In the application for leave to appeal judgment, the court a quo unequivocally said that no determination was made in respect of the Rule 35(1) application. At paragraph 5 of the said judgment, the court expressed: 'there were extensive and substantial documents in respect of Rule 35(1) of which I was not in a position to make a ruling on'.

[21] The presiding judge further held that the postponement was dismissed as it was in the interest of justice that the two exceptions be determined. She however explained that she erred 'in finding that a concession was made that if the exceptions were found to be good in law, it would not be necessary to grant early discovery'.

[22] It is evident that the court *a quo* had misdirected itself by not furnishing a decision in respect of the Rule 35(1) application. It was common cause that the Rule 35(1) application together with the postponement relief was before the court a quo. All the parties confirmed that the court a quo had in fact heard submissions pertaining to the Rule 35(1) application, as well as the request for the postponement.

[23] The appellants explained that they had not challenged the exceptions before the court a quo. They reasoned that the early discovery which they sought would

enable them to properly address the exceptions. It was on this basis that they sought the postponement. They argued that the court a quo was required to fully consider if there was merit in the Rule 35(1) application, and if so, the postponement would be justified.

[24] The pressing issue for consideration is whether it is appropriate for this court to make a determination on the Rule 35(1) application. Both the appellants' and Standard Bank held the view that this court is in as good a position to consider the Rule 35(1) application since all the facts are before the court and the matter was fully ventilated before the court a quo.

[25] Access Bank, on the other hand, contended that the court a quo's failure to decide the Rule 35(1) application is not appealable. As things stand there was no decision made by the court a quo as envisaged in s 16(1)(a) of the Superior Courts Act, 10 of 2013 (the Act). Secondly the appellants had alternative recourse, namely that the Rule 35(1) application could have been enrolled before a court of first instance.

[26] The point of departure is to appreciate that a court may only grant leave to appeal if the order sought to be appealed is a 'decision' within the meaning of s (16)(1)(a) of the Act. In *Neotel Pty Ltd v Telkom SA Soc Ltd and Others*⁴ the court explained that:

'If a decision did not constitute a "judgment or order" the decision was not appealable under the Supreme Court Act.'

The said court further held that a more practical and pragmatic approach should be adopted in determining whether interlocutory orders are appealable. The potential to open the floodgates with the court's inherent challenges should be avoided.

[27] The powers of a court on hearing appeals are prescribed in s 19 of the Act and reads:

⁴ *Neotel Pty Ltd v Telkom SA Soc Ltd and Others* [2017] ZA SCA (31 March 2017) para 13.

'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-

- (a) dispose of an appeal without the hearing of oral argument;
- (b) receive further evidence;
- (c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or
- (d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.'

[28] It is common cause that the Rule 35(1) application is interlocutory in nature. In this instance, no decision was made by the court a quo. The prevailing issue for determination, in my view, is whether an appeal court is suited to determine matters of this nature. In this instance, it was not disputed that the order anticipated in terms of the Rule 35(1) application would be interlocutory in nature.

[29] The authorities cited herein indicate that consideration should be given to the nature and effect of the order sought. *HJ v PJ*⁵ concerned an appeal against an interlocutory discovery order compelling the delivery of further particulars for trial. The issue before that court was whether the regional court order, which ordered the respondent to provide further particulars, was appealable.

[30] The High Court was criticized for failing to determine if the order was appealable. The court expressed its dissatisfaction and stated:⁶

'The upshot of the above is that the regional court's order to compel the respondent to discover is purely interlocutory in nature. It has no final effect, is not a definitive proceeding, and does not have the effect of disposing of at least a substantive portion of the relief claimed in the pending divorce action between the parties. Neither does it affect the rights of the parties whatsoever. The parties are still entitled to prosecute their case and are still at liberty to direct

⁵ *HJ v PJ* [2024] ZASCA 55 (19 April 2024) paras 10, 12 and 16 (*HJ v PJ*).

⁶ *Ibid* para 16.

the court to any evidence and to advance any argument that they wish. The High Court was obliged to entertain the issue, even if it was not raised, as to whether the matter before it was an appeal against a “decision” and thus an appeal within its jurisdiction mero motu. Its failure to do so amounts to a misdirection which is fatal to the appeal before this Court. This is so because the high court should not have proceeded with the merits as the regional court’s order was not appealable. It should have struck the matter of the roll.’ [Emphasis added]

[31] Furthermore the said court in having regard to the interest of justice factor cautioned that courts should not blindly adopt the standard of the “interest of justice” as the foundational basis when determining whether the matter is appealable or not. It pointed out that to do this “*would put in place a regime that is both unpredictable and open-ended*”. It would encourage litigants to persuade the high courts to grant leave, when they still have work to do. In upholding *TWK Agricultural Holdings (Pty) v Hoogveld Boerderybeleggings (Pty) Ltd and Others*⁷ the court expressed:

‘The decision in *TWK*, therefore, circumscribed the approach this Court and other courts, other than the Constitutional Court, can adopt on the issue of appealability of orders. It concluded that whilst different types of matters warranted some measure of appreciation that goes beyond *Zweni*, “...the doctrine of finality must figure as the control principle of consideration when deciding whether a matter is appealable to this Court”.’⁸

[32] The court in *Zweni v Minister of Law and Order of the Republic of South Africa*⁹ identified three attributes for a court order to be appealable, namely: the order should be final in effect and not susceptible to alteration by the court of first instance; it should be definitive of the rights of the parties, that is, it must grant definitive and distinctive relief; and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

⁷ *TWK Agricultural Holdings (Pty) v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA).

⁸ *HJ v PJ* fn 5 above para 12.

⁹ *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A) (*Zweni*).

[33] More recently the Supreme Court of appeal in *Minmetals Logistics Zhejiang Co Ltd v The Owners and Underwriters of the MV Smart and Another*¹⁰ expressed that the *Zweni* triad of attributes for an order to be an appealable order, is no longer cast in stone nor exhaustive. The proper emphasis should be on the nature and effect of the order, having regard to what is in the interest of justice. (Own emphasis.) What the interest of justice requires depends on the facts of a particular case. It stated: "If one of the attributes in *Zweni* is lacking, an order will probably not be appealable, unless there are circumstances which in the interest of justice, render it appealable. The emphasis has moved from an inquiry 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 interest 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.’¹¹ (Emphasis added.)

[34] In *Government Republic of South Africa v Van Abo*,¹² the court emphasized that there is no closed list of factors which can be considered. It was held that: '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 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.’¹³

[35] Guided by the said authorities and placing emphasis on the nature and effect of the order, I find this appeal court to be non-suited to make a determination on the Rule

¹⁰ *Minmetals Logistics Zhejiang Co Ltd v The Owners and Underwriters of the MV Smart and Another* 2025 (1) SA 396 SCA (1 October 2024).

¹¹ *Ibid* paras 32 to 33.

¹² *Government Republic of South Africa v Van Abo* 2011 (5) SA 262 SCA.

¹³ *Ibid* para 17.

35(1) application. In the present circumstances of the matter, the pleadings have not yet closed and an interlocutory application for discovery is pending. The nature and effect of the order anticipated, is interlocutory in nature.

[36] It would be undesirable to fragment this matter by hearing certain aspects on appeal prior to substantive resolution of the issues before the court of first instance. With pending trial proceedings before the court of first instance, it would be appropriate that the Rule 35(1) proceedings be adjudicated before such court. This will not prejudice the appellants in any way. Counsel for the appellants, in fact, informed us that the Rule 35(1) issue could have been dealt with before the court of first instance.

Costs

[37] In applying the general principle that costs should follow the result, the respondents as successful parties are entitled to their costs. Access Bank contended that it should never have been a party to these appeal proceedings as there was no existing *lis* with the appellants when this appeal was prosecuted. It had complied with the request for early discovery and did so timeously in order for the appellants to have addressed the exception. This fact was not disputed by the appellants. The appellants' submission was that the postponement was necessary as it would have been convenient to deal with both exceptions simultaneously. This reasoning is clearly untenable. In my view, there is no reason why Access Bank should not be awarded attorney and client costs. The second respondent, Standard Bank, is also entitled to its costs on Scale C.

Order

[38] Consequently I grant the following order:

1. The appeal is dismissed;
2. The appellants are to pay the costs of the first respondent on attorney and client scale;
3. The appellants are to pay the costs of the second respondent on Scale C.



H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,



R. TOLMAY J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,



R. FRANCIS-SUBBIAH J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

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Adv. FC Lambrecht

Instructed by: Riekert Terblanche Attorneys
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Counsel for the first respondent: Adv. C McConnachie

Adv. Z Raqowa

Instructed by: Lawtons Inc. p/a Lawtons Africa
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Counsel for the second respondent: Adv. BM Gilbert SC

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