

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A328/2024

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
16/9/2025	
DATE	SIGNATURE

In the matter between:

ALUXIUM PROPRIETARY LIMITED
ANDRE DE KOCK
CHRISTIAN DAVID FRISCHE

First Appellant
Second Appellant
Third Appellant

and

TASKFLOW PROPRIETARY LIMITED

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal

representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be ____ September 2025.

JUDGMENT

MAKHOB A J, (SENYATSI J – Dissenting Judgment) AND HASSIM J

- [1] The First Appellant is Aluxium (Pty) Ltd (herein referred to as “Aluxium”). The Second and Third Appellants are directors of Aluxium. The Respondent is Task Flow (Pty) Ltd (hereinafter referred to as “Taskflow”).
- [2] Taskflow is the Plaintiff in the main action. In the main action Taskflow seeks an order that Aluxium be interdicted and restrained from infringing the copyright in its taskflow computer program.
- [3] The court a quo ordered Aluxium subject to Taskflow concluding a written confidentiality undertaking, to discover the documents listed in Taskflow’s Rule 35(3) notice dated 14 April 2023. The court order is the subject of the Appeal before this court.

4. Grounds of appeal by the appellants.

The appellants submitted as follows:

- 4.1. The court a quo, whilst referring to the factual context did not actually consider the facts in the context of Aluxium’s claim of abuse. Instead, it only considered the issue of relevancy.
- 4.2. The court a quo erred in finding that Aluxium required the court to determine the veracity or defence raised by the parties in the pleadings. When in fact this is not what Aluxium contended for at all.

- 4.3. Aluxium's position was simply that Taskflow is not entitled to use the discovery process to try to find evidence to make out a case in circumstances where it has no evidence and has established no legal basis justifying the entitlement to further discovery. The contextual facts that Aluxium relied on, were put up to support the fact that Aluxium simply has no evidence.
- 4.4 The court a quo erroneously, reasoned that Aluxium should have invoked the remedies available under Rules 28(2) or 23, in response to Aluxium's amendments to its particulars of claim, when no such obligation rests on Aluxium and where the issue of the applicability of Rules 28(2) or 23 have no connection or relevance in a consideration of an application to compel discovery.
- 4.5. The Appellant submits that, a question that requires determination in this appeal, in the context of the facts identified above is, does a plaintiff, who has no evidence whatsoever to support the allegations made in its particulars of claim, have the right to use discovery procedure in a fishing attempt to get the evidence it needs to prove its case? In this regard it asserts that this appeal court is obliged to follow the dictum in law, for example, *STT Sales (Pty) Ltd v Fourie*¹ and find that Taskflow's Rule 35(3) notice is an abuse.
- 4.6. The Appellant submits further that Aluxium has stated under oath that the items requested in Taskflow's Rule 35(3) notice are not relevant to the issue on the pleadings. The court a quo erred in ordering the appellant to discover items that are not relevant to the pleadings.
- 4.7. On the appealability of the matter, counsel supported the view expressed by the court a quo, that it is in the interest of justice that the appeal should be granted.

¹ 2010 (6) SA 272 (G55).

- [5] Counsel for the Respondent argued that the computer programs and software requested in the third Rule 35(3) notice are relevant and it is in the interest of justice that the Appellants provide the Respondent with the information sought in the third Rule 35(3) notice.
- [6] Counsel argued further that, the additional documents sought in the third Rule 35(3) notice are relevant, material and correspond with the computer programs and software which according to the particulars of claim (as amended) are adaptations and/or reproductions of the Respondent's Taskflow computer programs and accordingly infringe the copyright in the Respondent's Taskflow computer program.
- [7] Counsel for the Respondent contended that the order of the court a quo is an interlocutory order. The onus to show that the judgment of the court a quo is appealable is on the Appellant.
- [8] Counsel for the Respondent contended further that when applying the principles set out in the *Zweni v Minister of Law & Order*² Judgment, the Court Order granted by the Honourable Acting Justice Mogagabe, compelling the Appellants to discover the computer programs and software is a simple interlocutory order, which is not appealable.
- [9] Counsel for the Respondent proceeded to submit that an order is deemed final and therefore appealable if it resolves the main issues in the case, leaving no further matters for the court to decide. On behalf of the Respondent, it was argued that on this basis alone the appeal is to be dismissed.
- [10] The reason furnished by the court a quo why it granted an application for leave to appeal is summarised in par 12 of the Judgment granting leave to appeal as follows:³

“...the nature and extent or broadness of the order, more particularly compelling the appellants to discover further computer programs and software as set out or

² 1993 (1) SA 523 (A).

³ Vol 4, Judgment Leave to Appeal at p.340 at par 12 of the Judgment.

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.”

Legal principles applicable

[11] In *Zweni v Minister of Law & Order*⁴, the Supreme Court of Appeal resolved that unless an interlocutory order has a final and definitive effect on the main action, it is not a judgment or order and is accordingly not appealable. The SCA held that a judgment or order is a decision which, as a general rule, has three attributes:

- (i) The decision must be final in effect and not susceptible to alterations by the court of first instance.
- (ii) It must be definitive of the rights of the parties, i.e. it must grant definite and distinct relief; and
- (iii) It must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.”

[12] In *Tshwane City v Afriforum and Another*⁵ the court said the following:

“...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 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.”

[13] In *National Treasury and others v Opposition to Urban Tolling Alliance and Others*⁶, the court held that;

⁴ Id.

⁵ 2016 (6) SA 279 (CC) at par40-41.

⁶ 2012 (6) SA 223 (CC) at para 25.

“whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable.”

- [14] In *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*⁷, the Constitutional Court in my view re-affirmed the decision in *Zweni*⁸. The court further said that an interlocutory order will be appealable *“if its effect is such that it is final and definitive of any issue or portion thereof in the main action.”* The court added that, “But now the test of appealability is the interest of justice⁹.”
- [15] In the UDM¹⁰ matter the Constitutional Court found that it was in the interest of justice that the matter was appealable because the interdictory relief in question resulted in the infringement of the right to freedom of expression.
- [16] In this matter before us, the Respondent has given an explanation why it wants the documents in question. The purpose of the request for discovery is to instruct an expert to consider the source code of the Appellant’s computer programs and software, and to provide an opinion on whether or not the Appellants computer programs and software infringe that of the Respondent as pleaded.
- [17] In my view the request for discovery by the Respondent does not in any way have a final and definitive effect on the main action and in terms of the *Zweni*¹¹ decision it is not appealable.
- [18] It must however be established, whether it was in the interest of justice to grant leave to appeal.

⁷ 2023 (1) SA 353 (CC) at para 41.

⁸ Id.

⁹ Id para 43.

¹⁰ Id para 45.

¹¹ Id.

- [19] In their heads of argument for leave to appeal, the Appellants submitted that the order of the court a quo was final in effect, because it is not susceptible to alteration by the trial court. It has the attributes of a final order and is appealable¹².
- [20] In my view the Appellants failed to show why the order of court a quo is final. In contrast I am of the view that discovery in this matter will enable the Respondent to prepare itself for the main trial. It is in my view not a fishing expedition.
- [21] The harm that will flow to the Respondent should the Appellant fail to discover will be irreparable¹³.
- [22] It is further my view that, the court a quo should have found that, it was not in the interest of justice to grant leave to appeal and that the order was not appealable.
- [23] It appears to me that, the computer programs and software requested in the third Rule 35(3) notice is relevant and it is in the interest of justice that the Appellants provide the Respondent with the information sought in the third Rule 35(3) notice.
- [24] I make the following order:
- 24.1. The appeal is dismissed with costs on Scale "C", which costs should include both junior and senior counsel's fees, where so employed.

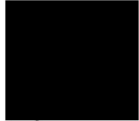
¹² Caselines 020-47 para 10.

¹³ UDM v Outa Id para 25.



D. MAKHOBHA J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA



SK. HASSIM J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of Hearing: 03 SEPTEMBER 2025

Judgment delivered: 16 SEPTEMBER 2025

Appearances

For the appellants: Adv R. MICHAU SC
Adv P.P. FERREIRA

For the respondent: Adv P. CIRONE