

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

27/09/2023

DATE

SIGNATURE

Case no.: **2021/20243**

In the matter between:

MATARAPRO (PTY) LTD

Applicant

And

MASHALA RESOURCES (PTY) LTD

Respondent

Coram:

Dlamini J

Date of hearing:

11 September 2023

Delivered:

27 September 2023

JUDGMENT

DLAMINI J

INTRODUCTION

- [1] The applicants seek leave to appeal against the order and judgment of this Court delivered on 8 September 2022.
- [2] The applicant had launched an application to place the respondent under provisional liquidation.
- [3] The applicant relies on various grounds for leave to appeal as contained in the Notice of Leave to Appeal as well as the Heads of Argument. This includes submissions made by Counsel for both parties before this Court during the hearing of the leave to appeal application.
- [4] The applicant has launched this application for leave to appeal in terms of Section 17(1)(a) of the Superior Courts Act.¹
- [5] The test for granting leave to appeal is now a higher one. The legislator's use of the word would in section 17(1)(a)(i) of the Superior Court Act imposes a most stringent and vigorous threshold.
- [6] This concept was captured thus by the Court in *Member of the Executive Council of Health Eastern Cape v Mikhita and Another*,² as follows that a court may now only grant leave to appeal if it is of the opinion that the appeal would have a realistic chance of success not may have a reasonable chance of

¹ Act 10 of 2013

² (1221/15) [2016] ZASCA 176 (25 November 2016)

success. A mere possibility of success or even an arguable case is not enough.

GROUND OF APPEAL

- [7] At the heart of the applicant's grounds of appeal, is the applicant's contention that the scope, import, and purpose of the compensation agreement falls outside of the day-to-day affairs and business activities of the respondent and as a result falls outside the scope and import of section 137(4) of the Companies Act,³ ("the Act").
- [8] Further, that this Court pronounced on the voidness of the compensation agreement without hearing and considering the submissions from the other party to the agreement namely Lateozest (Pty) Ltd.
- [9] Finally, insists the applicant that section 137 of the Act limits the agreements within its purview to agreements concluded by directors of a company in business rescue.
- [10] The parties further grounds of appeal, their heads of argument, this Court judgment including the entire record of appeal must be deemed to be incorporated in this judgment.

BACKGROUND FACTS

- [11] Briefly, summarized the facts are that the applicant avers that it had entered into a compensation agreement with the respondent in terms of which the respondent was liable to pay the applicant the sum of R14 million rands. As a result of the respondent's failure to pay the applicants, the applicants then launched these liquidation proceedings.

³ Companies Act 2008, as amended.

ISSUES FOR DETERMINATION

- [12] It is common cause that at the signing of the compensation agreement the respondent was under business rescue. It is also not in dispute that Mr. Kurt Herman who signed the compensation agreement was not a director of the respondent, and was not employed by the respondent. As the respondent was in business rescue, accordingly the full management and control of the respondent fell in the hands and authority of the Business Rescue Practitioner (BRPs). The respondents insist that BRPs did not give authority to Mr. Herman to sign the compensation agreement on behalf of the respondent, thus rendering the compensation agreement void.
- [13] On the main, the applicants have raised the same grounds of appeal that were similarly raised by them in the main application. I have in the main judgment dealt extensively with each main ground of the appellant's defence.
- [14] It is appropriate that we must revisit the provisions of Section 137 (4) of the Act which is relevant to this case and states the following:-
- (4) if, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioners, that action is void unless approved by the practitioner".*
- [15] The applicant's grounds of appeal are meritless and stand to be dismissed. In my view, the signing of the compensation agreement fell within the purview of taking any action on behalf of the company and it required the approval of the BRPs. Therefore a sensible and businesslike interpretation of this clause, means that if the BRPs did not approve the conclusion of the compensation agreement as was the position in this case, the agreement is void.

- [16] The reliance of the applicant in *Mahomed Mahir Tayop and Another v Shiva Uranium (PTY) Ltd and Others*⁴ is unhelpful. In that case, the Court had to consider whether the board of directors of a company in business rescue could validly appoint the business rescue practitioners following the removal of the previous BRPs. The Court held that the function of appointing the practitioners was a function of governance and not a management function. The court did not deal with the question of whether the conclusion of contracts fell within the requirements of section 137 (4).
- [17] In light of the above, based on section 17 of the Superior Court Act and the factual facts of this matter, I am not persuaded that there are any reasons or extraordinary circumstances in this matter that warrants the grant of leave to appeal which would have reasonable prospects of success or that there are any other compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration.
- [18] I am not convinced that the applicant has presented any facts that demonstrate that it has any prospects of success on appeal and therefore it would not be in the interest of justice to grant leave to appeal to the applicant.

ORDER

1. The application for leave to appeal is dismissed;
2. The applicant is to pay the costs of the respondent.

⁴ SCA (CASE NO 336/2019)



DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 11 September 2023

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