

REPUBLIC OF SOUTH AFRICA



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

Case Numbers: **57639/2021**

(1)	REPORTABLE: NO	
(2)	OF INTEREST TO OTHER JUDGES: NO	
(3)	REVISED: NO	
...19/09/2024.....		...ML SENTATS...
DATE		SIGNATURE

In the matter between:

**SIYAKHULA SONKE EMPOWERMENT
CORPORATION (PTY) LTD**

First Applicant

FREDERICK SAM ARENDSE

Second Applicant

And

**REDPATH MINING (SOUTH AFRICA)
(PTY) LTD**

First Respondent

REDPATH AFRICA LIMITED

Second Respondent

JUDGMENT
(Application for Leave to Appeal)

Introduction

- [1] This is an application for leave to appeal the judgment handed down on 7 May 2024. The applicants, the first and second applicants in the main application, which had attacked the rights offers issued by the first respondents to raise working capital from the shareholders, contend in the main, that I erred in the interpretation of section 41(3) of the Companies Act, 2008 (“the Act”). The applicant contends that the correct interpretation of section 41(3) of the Act ought to have the consequence that the shares issued through the rights offer by the board of the first respondent led to acquisition of more than 30% of the equity in the first respondent and that the two transactions leading to the issuance of those shares through rights offers should have been set aside as unlawful and in violation of section 41(3). The applicants criticise the judgment on various grounds, which on proper evaluation, amount to re-arguing the points that were argued in the main application. Consequently, I will not repeat those grounds in this judgment.
- [2] The application is opposed on the grounds, *inter alia*, that I interpreted the provisions of section 41(3) of the Act correctly and that there are no prospects that the appeal would succeed and that the application should be dismissed with costs.
- [3] The requirements and the test for granting leave to appeal are regulated by section 17(1)(a) of the Superior Courts Act No. 10 of 2013 which states as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned are the opinion that –

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

[4] In *Mont Chevaux Trust v Goosen and Others*¹ Bertelsman J interpreted the test as follows:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion... The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

[5] In *Acting National Director of Public Prosecutions and Others v Democratic Alliance: In re: Democratic Alliance v Acting National Director of Public Prosecutions*² the court acknowledged the test by Bestertsman J and said the following:

“The Superior Courts Act has raised the bar for granting leave to appeal in *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*, Bertelsmann J held as follow:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985

¹ 2014 2325 (LCC)

² (Case no: 19577/09) ZAGPPHC 489 at para 25

(2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

- [6] In *Mothuloe Inc Attorneys v The Law Society of the Northern Provinces and Another*³, the Supreme Court of Appeal stated as follows regarding the trial court's liberal approach on granting leave to appeal:

"It is important to mention my dissatisfaction with the court a quo's granting of leave to appeal to this court. The test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or mere possibility of success."

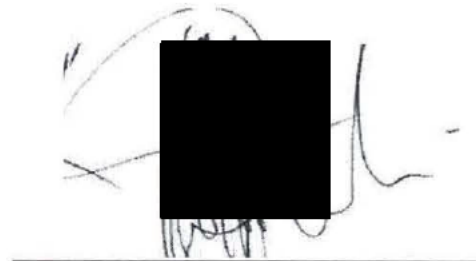
- [7] Having considered the grounds of appeal and the heads of arguments by both counsel, I am persuaded that the requirements of section 17(1) (a) of the Act have been met and another court may well differ with me on the interpretation of section 41(3) of the Act.
- [8] Mr Wickins SC on behalf of the applicants contended during argument that if leave is considered favorably, it should be to the Supreme Court of Appeal ("the SCA") because the law on the interpretation of section 41(3) of the Act has not yet been dealt with by that Court. I am in agreement with the sentiment by Mr Wickins SC.
- [8] It follows in my view that the respondents have passed the muster on showing that the appeal would succeed and accordingly, the application for leave to appeal should succeed.

³ (213/16) [2017] ZASCA 17 (22 March 2017)

Order

[8] The following order is issued:

- (a) The application for leave to appeal is granted to the Supreme Court of Appeal and is restricted to the interpretation of section 41(3) of the Companies Act, 2008.
- (b) The costs of the application are to be the costs of appeal.

A handwritten signature in dark ink, appearing to be 'ML SENYATSI', is written over a large black rectangular redaction box. The signature is somewhat stylized and cursive.

ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **19 September 2024**.

Appearances:

For the applicant: Adv GD Wickins SC
Adv T Scott
Adv T Pooc

Instructed by Cliffe Dekker Hofmeyr Inc

For the first respondent: Adv S Symon SC
Adv D Watson
Instructed by Kampel Kaufmann Attorneys

For the second respondent: Adv J Blou SC
Adv A Friedman
Instructed by Werksmans Attorneys

Date of Hearing: 18 September 2024

Date of Judgment: 19 September 2024

