

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

CASE NO: 2022-018387

DOH: 10 March 2025

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

DATE 27 MARCH 2025

SIGNATURE

In the matter between:

NEW SALT ROCK CITY (PTY) LTD

Registration No. 2007/005000/07

First Applicant

ZAMIEN INVESTMENTS 102 (PTY) LTD

Registration No. 2003/006135/07

Second Applicant

CSHELL 80 (PTY) LTD

Registration No. 2005/029828/07

Third Applicant

FREDERICK WILHELM AUGUST

LUTZKIE 6[...]

Fourth Applicant

And

KILKEN PLATINUM (PTY) LTD

Registration No. 2003/001334/07

First Respondent

KILKEN INVESTMENTS (PTY) LTD

Registration No. 2020/551840/07

Second Respondent

KILKEN ENTERPRISES (PTY) LTD

Registration No. 2020/551835/07

Third Respondent

KILKEN HOLDINGS (PTY) LTD

Registration No. 2020/551830/07

Fourth Respondent

ZUNAID ABBAS MOTI

ID: 7[...]

Fifth Respondent

CITAX INVESTMENTS SA (PTY) LTD

Registration No. 2021/000194/07

Sixth Respondent

ANY RENTAL (PTY) LTD

Registration No. 2007/010332/07

Seventh Respondent

ORDER

1. Leave is granted to the Full Court of this division.
 2. Costs shall be costs in the appeal.
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JUDGMENT

BAM J

Introduction

1. This is an application for leave to appeal the judgment and order of this court of 28 May 2024. The application is opposed by the respondents. The grounds of appeal are set out in the applicants' Notice of Application for Leave to Appeal, (notice)

dated 20 June 2024. In their Heads of Argument, the applicants raise further points which are not necessarily covered by the grounds set out in the notice. The legal principles dealing with whether a party may raise new legal points on appeal are trite¹. For purposes of this judgment, I confine myself to the grounds set out in the applicants' notice.

2. The broad thrust of the respondents' resistance to the application is that the applicants have failed to upset the findings of the court *a quo* and on that basis the applicants have no prospects of success, much less reasonable prospects. They contend that the applicants have misconstrued the concept of Rouwkoop, including the principles governing reciprocal obligations and election in the event of breach.

Applicable Legal Principles

3. Applications for leave to appeal are governed by section 17 of the Superior Courts Act². The relevant parts of the provision read:

'17. Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of 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. The test, according to the Supreme Court of Appeal in *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) & another*, 'is not whether [a] proposed appeal should succeed but whether there are reasonable prospects of success in the proposed appeal.'³ It is not 'whether a litigant has an

¹ *Barkhuizen v Napier*, (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007), paragraph 39; *SAAB Grintek Defence (Pty) Ltd v South African Police Service and Others* (316/2015) [2016] ZASCA 104; [2016] 3 All SA 669 (SCA) (5 July 2016), paragraph 26; *Fischer and Another v Ramahlele and Others* (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) (4 June 2014), paragraph 13.

² Act 10 of 2013.

³ (245/2017) [2018] ZASCA 012 (8 March 2018), paragraph 2.

arguable case or a mere possibility of success.’⁴

Applicants’ grounds

- i) The applicants submit that this court erred in not finding that on a proper interpretation of the settlement agreement, of 25 October 2021, the Rouwkoop clause became effective *ex tunc*, and therefore was perfected on 31 January 2022, as a result of the non-payment of the amount of R350 million.
- ii) The court erred in not finding that the clause in the settlement agreement that the parties agreed to ‘stop litigation now’ properly interpreted, was intended to have the meaning that all pending litigation had become moot by virtue of the settlement agreement, in accordance with the judgment under case number 37252/2021, delivered on 18 May 2022.
- iii) The court should have found that the principle of *exceptio non adimpleti contractus* found no application in the adjudication of the dispute and that consequently the Rouwkoop agreement remained enforceable.
- iv) The court should have found that on a proper interpretation, ‘stop litigation now’, meant that all pending litigation had become settled and compromised and therefore moot as confirmed by the judgment of this court and that this court was bound thereby.
- v) The court erred in not finding that upon non-payment of the R350 million on 31 January 2022, the Rouwkoop obligations on the part of the first to the fourth respondents forfeited the Rebosis shares and helicopter, pursuant to the Rouwkoop agreement.
- vi) The court erred in not finding that the fourth applicant had fulfilled the obligations imposed upon him in accordance with clause 4 of the settlement agreement by placing the shares into an attorney’s trust account.
- vii) The court erred in not finding that in accordance with the transcript of an audit recording dated 25 October 2021 and the discussion between the fourth applicant, and Mr Moti, the parties to the settlement agreement intended that the Rebosis shares and the helicopter were to be delivered ‘upfront’ upon the execution of the settlement agreement, or within days thereof and that if payment did not take place as agreed on 31 January 2022, the Rebosis shares and the helicopter were to be forfeited as Rouwkoop.

⁴ *Mothuloe Incorporated Attorneys v Law Society of the Northern Province and Another*, (213/16) [2017] ZASCA 17 (22 March 2017), paragraph 18.

viii) The court erred in finding that the cancellation of the settlement agreement by the first to the third applicants constituted an election not to enforce the Rouwkoop agreement. The court should have found that the first to the third applicant did not abandon nor intend to abandon their rights arising from the Rouwkoop agreement *ex tunc* and that this was borne out in the letter from Gothe Attorneys of 18 June 2022.

Conclusion

5. I have considered the applicants' grounds of appeal. I am of the view that there are prospects that another court may come to a different decision on the grounds raised. On this basis, leave to appeal should be granted to the Full Court of this division.

Order

1. Leave is granted to the Full Court of this division.
2. Costs shall be costs in the appeal.

N.N BAM
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Date of Hearing: 10 March 2025
Date of Judgment: 27 March 2025

Appearances:

Counsel for the Applicants: Adv J.J Brett SC with Adv L.F
Laughland
Instructed by: Schickerling Incorporated
Melrose Arch
Johannesburg

Counsel for the Respondents: Adv T Dalrymple
Instructed by: Knowles, Husain Lindsay Inc

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