REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no: 2023/005460

(1)	REPORTABLE: No
(2)	OF INTEREST ~~TO OTHER~~ JUDGES: No

25.08.27 [redacted]

DATE SIGNATURE

In the matter between:

SIPHESIHLE PATRICK MKHIZE	First applicant
NORA FINANCE (PTY) LTD	Second applicant
NORASPACE (PTY) LTD	Third applicant
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth applicant

and

KWANDILE RESOURCES (PTY) LTD	Respondent

These reasons were delivered by uploading it to the court online digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties on 27 August 2025.

REASONS

VAN DER WALT AJ

Introduction

[1] The main application in this matter was instituted at the behest of a company, Kwandile, for a money judgment and an order declaring one of its former directors delinquent (the main application). The main application is based on a written acknowledgement of debt. The respondents opposing the main application did not file answering affidavits. Instead, Mr Mkhize, Nora Finance (Pty) Ltd and Nora Space (Pty) Ltd (who I will refer to as the applicants) served on Kwandile two notices based on Rule 7 of the Uniforms Rules of Court.

[2] In the first notice Kwandile was asked to produce a power of attorney to prove the authority of the attorneys acting on its behalf. Kwandile replied, producing a power of attorney signed by Ms Modise. The second Rule 7 notice was based on arguments that the round-robin resolution taken by Kwandile's directors, produced by Kwandile in answer to the first Rule 7 notice, was invalid and that, even if it were valid, it did not authorise Ms Modise as intended. As to the invalidity of the notice, the applicants said that the directors of Kwandile serve for only three years and that the directors who signed the resolution ceased to be directors of Kwandile long before they signed the resolution. Secondly, the applicants said the resolution was not taken at a duly constituted and quorate meeting of Kwandile's board. And, thirdly, the resolution did not carry with more than a 50% majority as required by Kwandile's memorandum of incorporation. It was the applicants' case that what was required for Kwandile to have properly authorised the main application, was a special resolution by Kwandile's shareholders. Kwandile replied, standing by its reply to the first Rule 7 notice and asserting that applicants' reliance on Rule 7 was a delaying tactic.

[3] On 7 October 2024, I dismissed an interlocutory application that had been made by the applicants to assert their arguments in terms of Rule 7. The judgment considered the parties' submissions in terms of three main issues. Firstly, who Kwandile's directors were at the time of the issuance of the main application. Secondly, whether a special resolution was required to authorise the main application. And, thirdly, whether the round-robin resolution authorised the institution of the main application.

[4] The applicants sought leave to appeal the dismissal of the interlocutory application. A hearing was held on 21 November 2025. On the same day, shortly after again having again considered the documents filed of record, counsel's submissions and the matter generally, I issued an order to that effect and that the application for leave to appeal is dismissed with costs on scale C. I had concluded that the application for leave was meritless and should be dismissed forthwith.

[5] On 2 June 2025, more than six months hence, the applicants asked for reasons for the order dismissing the application for leave to appeal. This request came by way of emails sent by a candidate attorney to the court. According to these emails the applicants had petitioned the Supreme Court of Appeal and that it would not accept their application if it were not accompanied by a judgment setting out the reasons for dismissing the application for leave to appeal. I was reluctant to accept the contents of these emails at face value in circumstances where, firstly, the applicants already faced the charge that the interlocutory application (based as it was on the premise that the company did not authorise an application to enforce a written acknowledgment of debt in its favour) was a delaying tactic. Secondly, the request for reasons came 6 months after the relevant order issued. Thirdly, the application for leave to appeal was against an interlocutory order. Fourthly, the order dismissed an application for leave to appeal which, as far as the provision of extensive reasons is concerned, stands on a different footing than orders granting leave to appeal. I therefore sought formal confirmation of the facts contained in the candidate attorney's emails.

The existence of the petition has since been confirmed by clerks of the court and the Acting Judge President, for which I am indebted.

[6] These are the reasons for the order dismissing the application for leave to appeal the order disposing of the interlocutory application. The parties did not file heads of argument in the application for leave to appeal. The notice of appeal, however, followed the structure of the judgment against which leave was sought and the issues identified therein. In fairness to the attorney for the applicants, he did style them "so-called" issues. I will follow the same structure, except to deal first with appealability and the interests of justice, then with the two issues central to Kwandile's case, and then with the issue central to the applicants' case.

Appealability and the interests of justice

[7] During the hearing of the interlocutory application, I asked counsel for the applicants to address me also on the appealability of the interlocutory order. It is after all for an applicant for leave to appeal to show that a decision is appealable. First, for a decision to be appealable it must be final in effect and not susceptible to alteration by the court of first instance. Secondly, it must be definitive of the rights of the parties, i.e. it must grant definite and distinct relief. Thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[1] In some cases, not meeting these requirements is not fatal, as a decision would be appealable if it is final and definitive in effect or if the interests of justice require the decision to be deemed appealable.[2]

1 *Crockery Gladstone Farm and Rainbow Farms (Pty) Ltd* (592/18) [2019] ZASCA 61 (20 May 2019) and *DRDGold Ltd v Nkala* 2023 (3) SA 461 (SCA) (*DRDGold*) pars. 24 and 27.

2 *DRDGold* pars. 25 and 27.

[8] Subsequent to the Rule 7 challenges, Kwandile appointed new attorneys. This notwithstanding, counsel for the applicants submitted in reply (for he did not deal with appealability in his main address) that the interlocutory order his clients sought to appeal was final in effect. I did not, and cannot, see how that submission could be correct. The relevant question was one relating to authorisation. The specific authorisation in question has since been overtaken by events; events which affect whether the prosecution of the matter to finality is properly authorised. Once that is accepted, as it must be, I cannot see how a finding about the initial authorisation of the main application is final in effect even on the narrow issue of authorisation. Counsel for the applicants did not address the second and third requirements for an appealable decision and those requirements, to my mind, were not satisfied by the interlocutory order in this case.

[9] As to the interests of justice, counsel for the applicants submitted that the interpretation of the memoranda of incorporation made in the judgment disposing of the interlocutory order has broader implications, which are important generally. I disagree. The interpretation was done on established general principles with a caveat, one I heeded, to be kept in mind when it comes to interpreting memoranda of incorporation. The judgment certainly went no further than interpreting only Kwandile's memoranda of incorporation. Mr Carstensen SC, for Kwandile, submitted that facts that new attorneys had in the interim been appointed to act for Kwandile and that their appointment had not been challenged on any basis, goes also to the interests of justice. I agree. It shows that the insistence by the applicants on proceeding with their initial Rule 7 challenges while they have been rendered irrelevant by a further authorisation, is driven by an objective of delay. The same reasoning applies to affording the applicants an appeal.

[10] The decision sought to be appealed is not final in effect, it is not definitive of the rights of the parties, and it does not have the effect of disposing of at least a substantial portion of the relief claimed in the main application. The

interlocutory order therefore was and is not appealable. The interests of justice were also against the applicants.

Prospects of success

[11] The Supreme Court of Appeal has held that an applicant for leave to appeal now faces a more stringent test to show that an appeal has prospects of success. It held that leave to appeal must not be granted unless there is truly a reasonable prospect of success,[3] and that a mere possibility of success, an arguable case or one that is not hopeless, is not enough.[4] In my view the application did not satisfy this test. As to general lack of merit, firstly, the applicants attacked the court's approach to "onus". Irreconcilably with this approach, they then proceeded to in the main differ with the court's findings about the meaning of Kwandile's memoranda of incorporation. Interpretation, however, is a matter of law, not fact. In this case, it was in any event supported by common cause facts. How arguments about "onus" could have assisted the applicants, were and are therefore not readily apparent to me.

[12] Secondly, the applicants failed to distinguish between the burden of proof Kwandile bore, and the burden of proof they bore.[5] Kwandile satisfied the court that an ordinary resolution by directors was required to authorise the main application and that the directors indeed properly made a resolution to that effect. The applicants' case was that a special resolution of Kwandile's shareholders had been needed to properly authorise the institution of the main application. Their interpretation of the memoranda of incorporation, however, among other things, made no business sense. Even if it did, found the court, the applicants did not put evidence before the court that showed that the

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3 *MEC for Health, Eastern Cape v Mkhita* (Unreported, SCA case no 1221/2015 dated 25 November 2016) par. 16.

4 Ibid par. 17.

5 Cf. *Tattersall v Nedcor Bank Ltd* 1995 (3) SA 222 (A) 228F – H.

conditions to be satisfied for the provision requiring a special resolution to have effect, on the applicants interpretation, were fulfilled.

[13] Thirdly, the judgment disposing of the interlocutory application did not have as its "basic premise", as the applicants would have it, the fact that no one had challenged who the directors of Kwandile were at the date of the issuance of the main application. That was at most an introductory remark made in passing. The reasoning of the judgment proceeded from the principles in respect of the interpretation of documents, including memoranda of incorporation, and the limited circumstances in which a court can have regard to parties' conduct subsequent to the production of a document, as evidence of how reasonable businesspeople situated as they were and knowing what they knew, would construe the document. I didn't foresee another court reaching a different conclusion about the content of these principles, recently affirmed by the Supreme Court of Appeal as they are.

[14] As to what remains of the applicants' arguments in respect of the three issues, the following.

Kwandile's directors at the time of the institution of the main application

[15] The conclusion on the first issue was reached through, firstly, findings on common cause facts (including the facts put before the court evident from the records of the Companies and Intellectual Property Commission), and, secondly, an interpretation of the memorandum of incorporation. The facts included when Kwandile was incorporated, the minimum number of directors of the company, the dates of appointment of the directors in 2018, under which memorandum the directors were appointed, and the date of the amendment of the memorandum of incorporation. The interpretation of the memorandum as to the effect of its amendment, was supported by the conduct of the shareholders and directors of the company. The material facts in this regard

were that no new directors were in fact appointed and that the directors continued in their offices as if their tenures were unaffected.

[16] Secondly, the applicants argued that the court erred in “speculating” that the “lawful compliance” with the memorandum of incorporation by the shareholders and directors would have left the applicant with no directors since June 2022. On this, two matters deserve mention. Firstly, the memorandum of incorporation determines what is “lawful” and what is not. In accordance its proper interpretation, Kwandile did indeed have directors throughout. Secondly, the exercise as to the hypothetical factual situation should the applicants' interpretation have been found to be correct, was based on the exercise performed under oath by the applicants' attorney. He attached a copy of the Companies and Intellectual Property Commission's relevant records to the applicants' papers, together with a helpful summary of when the directors' terms would have ended, had the applicants' contentions regarding the interpretation of the memorandum of incorporation been correct. The court did not speculate. The court based its reasoning on common cause facts, including facts disposed to for the applicants.

[17] The applicants' arguments in respect of this issue had and has no prospects of success.

Did the round-robin resolution authorise the institution of the main application?

[18] The further issue material to the case Kwandile sought to make out, was whether the round-robin resolution properly authorised Ms Modise to have the main application instituted. This issue was resolved through an interpretation of the memorandum of incorporation, the principles regarding round-robin resolutions, the round-robin resolution itself, and the principles regarding directors voting when they have an interest in a proposed resolution.

[19] The applicant's main argument on this issue was that the court erred on determined who could vote by way of the round-robin resolution, seeing as the court erred in determining who Kwandile's directors were at the relevant time. That I have dealt with and need not address again here. Then the applicants argued that the court erred "in disregarding, without reason" the absence of proper notification of a "round-robin meeting" of all directors. In addition to what the judgment held regarding round-robin resolutions, what remained was clear from the resolution on its face and Ms Modise's submissions regarding the validity of the resolution. That is the end of the arguments on this score, although the applicants did attempt to include aspects of their case into Kwandile's case. It is to the applicants' case that I now turn.

Was a special resolution by its shareholders required to authorise the institution of the main application?

[20] It was the applicants' case that a special resolution by Kwandile's shareholders was required to authorise the institution of the main application. The court disposed of their case on two bases. Firstly, their case was not supported by the text the memorandum of incorporation. The interpretation they argued for also did not make any business sense. As the applicants would have it, the memorandum requires a special resolution of shareholders for the company to institute a claim based on the acknowledgement of a large debt due to it. I.e., the decision to claim a large sum due to the company, is taken out of the hands of Kwandile's directors, and is something only the shareholders could by special resolution authorise. As the applicants would have it, the memorandum requires an ordinary resolution by directors for the institution of claims in the hands of the company for a low value, but the more onerous special resolution of shareholders when the company institutes a claim for a higher value. This absurdity does not arise if the clause is given its evident meaning: that it is a clause not about the claim initiated, but rather the risk or exposure for Kwandile it may give rise to.

[21] The second basis on which the court found against the applicants on this issue, was that they did not depose to facts that would have been relevant and material to their success if their interpretation of the relevant provision was upheld. This was an additional finding against the applicants. Standing on its own it is inconsequential, because the interpretation the applicants argued for was not upheld. Having failed to lead the necessary facts, their arguments in this regard were bad also for this reason.

[22] As the applicants' arguments on interpretation had no prospects of success and as it was the applicants who bore the onus of proof in respect of their case, their arguments about the lack of facts before the court regarding the value of the company do not assist them. Also their arguments in respect of this issue had no prospects of success.

[redacted]

Nico van der Walt

Acting Judge, Gauteng Division,
Johannesburg.

Request for reasons: 2 June 2024

Reasons: 25 August 2025

Appearances:

For the applicants

Adv Anthonie J van Vuuren

Instructed by Van Zyl Johnson Inc

For the respondent

Adv Paul Carstensen SC

Instructed by Edward Nathan Sonnenbergs