REPUBLIC OF SOUTH AFRICA

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

Case Number: 025365/2024

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

18 May 2026 [redacted]
DATE SIGNATURE

BRIGHTWARD HOMEOWNERS ASSOCIATION	Applicant for leave
and	
VELI KHOSA	First Respondent
LEKULA SYDWELL MOFOKENG	Second Respondent
DUMISANI PASCALL ZUMA	Third Respondent
WANDILE MAZULA	Fourth Respondent
TUMI SMITH	Fifth Respondent

JUDGMENT

BRICKHILL AJ:

Introduction

[1] This is an application for leave to appeal against part of the judgment and order handed down on 4 September 2025.[1] The application is brought by the original applicant and the parties therefore remain as designated in the main application. The application was heard virtually. The parties provided written heads of argument that were of substantial assistance.

[2] In the main application, each of the parties enjoyed substantial yet partial success.

a. The applicant ("the Homeowners Association") secured declaratory relief permitting virtual members' meetings, but subject to the important proviso requiring effective participation under the Companies Act 71 of 2008 ("Companies Act") and subject to the right of members to object to virtual meetings under the Memorandum of Incorporation ("MOI"). The order confirmed that the eAGM platform is one permissible option.

b. The Homeowners Association further secured an order declaring the in-person purported AGM held at the Estate Clubhouse on 20 February 2024 by the respondents ("the respondent homeowners") was unlawful, although the directors were under an obligation to convene it in response to the members' requisition. As a result, the Homeowners Association also succeeded in establishing that the previously determined levies remain valid.

c. The respondent homeowners, though unsuccessful in asserting that virtual meetings are entirely impermissible, established the important proviso and qualification to the power to call virtual meetings. They established that their objection to the virtual purported AGM was lawful and effective, rendering the meeting unlawful and resolutions taken at it invalid. Finally, the court granted an order arising from these conclusions requiring the Homeowners Association to reconvene the AGM and to do so in person, in light of the

[1] *Brightward Homeowners Association v Khosa and Others* [2025] ZAGPJHC 903.

valid objection and the fact that effective participation was not secured previously.

d. Despite plausible concerns regarding the Developer's veto power and how it has been deployed by the Developer, I determined that the failure to join the Developer precluded a determination that this power constitutes oppressive conduct under the Companies Act.

e. I made no order as to costs in the main application, in light of the partial success of both sets of parties.

[3] The application for leave to appeal is directed only at paragraphs 2.2 of the order and the consequential relief granted in paragraphs 3, 4, 5 and 9 of the order. The order in paragraph 2 read:

> "2. It is declared that it is lawful for the Applicant to hold meetings of members by way of electronic communication on a virtual platform, including using the online voting platform eAGM, provided that:
>
> 2.1 the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting; and
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> 2.2 subject to the right of members to object to the meeting taking place virtually in terms of clause 2.21.1.1 of the Applicant's Memorandum of Incorporation."

[4] The Homeowners Association embraces the order granted in their favour in the first part of paragraph 2, declaring that it may hold meetings by way of electronic communication, and accepts the first proviso in paragraph 2.1 – which requires such virtual meetings to satisfy the statutory standards in section 63 of the Companies Act. However, it disputes the second proviso in paragraph 2.2 of the order, which gives members the right to object to meetings taking place virtually in terms of clause 2.21.1.1 of the MOI.

[5] The remainder of the application for leave to appeal flows from the order in paragraph 2.2, including the consequent orders: in paragraph 3 declaring that the members had lawfully objected to the AGM taking place on a virtual platform in terms of clause 2.21.1.1, paragraph 4 declaring the AGM of 20 February 2024 unlawful in light of the objection, paragraph 5 setting aside resolutions and decisions made at that meeting, and paragraph 9 directing the applicant to reconvene the AGM in person. These are the orders against which leave to appeal is sought. There was no application for leave to appeal in respect of the remainder of the order, and no application for leave to cross-appeal by the respondent homeowners. I made no order as to costs in the main application given the mixed result, and that order is also not sought to be challenged.

[6] For the applicant, Mr Porteous identified as the crisp issue in the application for leave to appeal the interpretation of paragraph 2.21.1.1 of the Memorandum of Incorporation ("MOI"), which provides that:

> "If 10 (ten) percent of members to whom the notice convening the meeting is sent, in writing object to the address at which the meeting is to be held at least 7 (seven) days before the meeting, the Directors shall have no alternative but to re-schedule the meeting to take place at an address within the magisterial district in which the scheme is situated."

[7] The applicant argues that clause 2.21.1.1, in using the words "object to the address at which the meeting is to be held", is concerned only with the physical location of an in-person meeting and that the court erred in holding that it applies to virtual meetings.

[8] Before dealing with the merits, I must comment on a preliminary issue of delay. The judgment in the main application was handed down on 4 September 2025, but the application for leave to appeal was only set down for hearing on 7 April 2026. I raised with counsel for both sets of parties my concerns regarding the delay in setting down the application for leave to appeal. Neither Mr Porteous nor Mr Mokoena was able to fully explain why it took over six months to set down the application for leave to appeal, though it appeared to be primarily due to constraints in the availability of the respondent homeowners' counsel in the

intervening period. In late October 2025, in correspondence that has been placed before the court, the respondents informed the applicant that their senior counsel's first available dates for hearing the application for leave to appeal would be 7 April 2026.

[9] The delay is regrettable. An application for leave to appeal should be heard as soon as possible after judgment is handed down. Had the difficulties been brought to my attention, the court would have ensured that the application be heard and decided more expeditiously, if necessary by hearing the application outside court hours or by deciding it on the papers. In any event, notwithstanding some tentative submissions on possible mootness, the delay has no bearing on the merits of the application for leave to appeal.

Test for leave to appeal

[10] The test for leave to appeal is governed by section 17 of the Superior Courts Act 10 of 2013. The Homeowners Association seeks leave on the basis that the appeal would have a reasonable prospect of success in section 17(1)(a)(i), which provides:

> "leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success."

[11] In the language of section 17, the court "may only" grant leave if of the opinion that the appeal "would" have a reasonable prospect of success.[2] The introduction of these features in the Superior Courts Act raised the question whether section 17(1)(a)(i) entails a stricter test than previously applied under the Supreme Court Act 59 of 1959.

[2] See Van Loggerenberg *Erasmus: Superior Court Practice* RS 5, 2025, D-103 to D-105 and the cases cited at fn 8.

[12] The authorities, including in this division, have split on whether the introduction of 'would' in the reframed test has raised the bar,[3] or left it unchanged.[4]

[13] The history of the test for leave to appeal since 1909 is usefully traced by Meiring AJ in *Smartpurse*, before reaching the conclusion – appropriately informed by this historical analysis – that the test is unchanged under section 17 of the Superior Courts Act. In relation to the change in language, Meiring AJ held:

> [56] With respect, in my view, this analysis is premised on a misunderstanding of the respective semantic and syntactic roles of "*might*" and "*would*". What the applicant for leave must show is that there *is* or *would be* a reasonable prospect of success on appeal. This might well colloquially be couched as the standard that the appeal *might* reasonably succeed. Yet, the rather different notion that there *might* be a prospect of success is an inscrutable one. To the extent that it has any meaning, it posits a standard so low that it could never be the measure for leave. It certainly was not the standard before the promulgation of the Superior Courts Act.
>
> [57] Put differently, "*a likelihood that another tribunal will*" is broadly synonymous with "*that another tribunal might*".

[14] Ultimately, Meiring AJ in *Smartpurse* reached the following conclusions on the test under section 17(1)(a)(i):

> [63] From the above examination of the historical development of the decisions on leave to appeal, it would appear that, from the early period under the South Africa Act, 1909, to the present, the test for leave to appeal has gone unchanged. The debate over the heightening of the threshold in the wake of the promulgation of the Superior Courts Act rests upon a misunderstanding of the context of the use, in the cases and latterly in that statute, of the modal verbs "*might*" and "*would*".
>
> [64] Indeed, without undertaking a survey of the *travaux preparatoire* of the 2013 Act, it seems inescapable that the legislature sought simply to enact the very test that already applied at common

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[3] *The Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) para 6; Pule Inc and Others v Revfin (Pty) Ltd (2022/024265) [2026] ZAGPJHC 42.

[4] *Smartpurse Solutions (Pty) Ltd v Firstrand Bank Ltd* [2024] ZAGPJHC 961; [2025] 1 All SA 552 (GJ).

> law. In sum, the test is – and appears always to have been – whether there *is* or *will be* a reasonable prospect of success on appeal, or, in other words, that another court *might* reasonably find differently.
>
> [65] The Superior Courts Act did not bring with it a new test for leave to appeal.
>
> [66] What the applicant must demonstrate is that there is a "*reasonable prospect of success*". The notion of success is qualified by the words "*reasonable prospects of*". Something has "*reasonable prospects*" where, as the Supreme Court of Appeal has held, "*[a] sound rational basis for the conclusion that there are prospects of success … exist*".[5]
>
> [67] Considered in the round, to establish a "*reasonable prospect of success*" on appeal, the applicant must demonstrate that there exists some sound, cognisable reason why an appeal court would find differently to the court of first instance. In other words, there must be a reasonable possibility, not a certainty, of success on appeal. This possibility must exist (it must not be hopeless) and must be reasonable (based on logic)."

[15] I find the reasoning in *Smartpurse* persuasive and, if free to decide the issue, would follow it.

[16] However, after initially leaving open the question whether the test had been changed in *Ramakatsa*,[6] the Supreme Court of Appeal in *MV 'Tai harmony'* has concluded that the test has been made stricter under section 17, going so far as to describe it as "trite" that section 17(1)(a)(i) has "raised the threshold for granting leave to appeal".[7]

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[5] Original footnote refers to *Ramakatsa v African National Congress* [2021] ZASCA 31 para 10.

[6] *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 para 10.

[7] *MV "Tai harmony" and Another v Sure Success Steamship S.A and Another* [2026] ZASCA 60 para 56.

[17] In *MV 'Tai harmony'*, Mbatha JA, for a unanimous court, framed the test as now requiring that "[t]here must therefore exist more than just a mere possibility that another court will, not might, find differently on both facts and law."[8]

[18] For my part, I agree with Meiring AJ that the test is, and has always been, whether there *is* or *will be* a reasonable prospect of success on appeal, or, in other words, that another court *might* reasonably find differently. Whether this is framed as a prospect that another court 'will', 'would' or 'might' find differently does not change the inquiry, in my view.

[19] However, to the extent that the Supreme Court of Appeal has held that the test requires a higher degree of likelihood that another court will find differently, I am bound to follow it and expressly do so in this judgment. In any event, it makes no difference to the outcome of this application, which would be unchanged on the 'old' approach to prospects of success.

[20] I agree with Mr Porteous for the Homeowners Association that the Supreme Court of Appeal decision in *Ramakatsa*, as also approved by Meiring AJ in *Smartpurse*, provides a useful formulation of the test for practical purposes, namely that:

> "Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."[9]

[21] I accordingly apply the test as set out in section 17(1)(a)(i) of the Superior Courts Act and interpreted in *Ramakatsa*, but conscious of the Supreme Court decision in *MV 'Tai harmony'*, by which I am bound, that this must be understood to entail a stricter test than previously existed and accordingly a higher degree of likelihood that another court will, not might, find differently.

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[8] Ibid.

[9] *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 para 10.

The central issue

[22] The application for leave to appeal therefore turns on whether is a reasonable prosect that another court would come to a different conclusion on the interpretation of clause 2.21.1.1 – that is, the conclusion that members' right to object under the clause applies only to in-person meetings and not to meetings on a virtual platform.

[23] The Homeowners Association argues that, on a plain reading of clause 2.21.1.1 of the MOI, it only applies where the directors have given notice of intention to hold a members meeting at a physical location outside the magisterial district in which the scheme is located and that it has no application to virtual meetings.

[24] The Homeowners Association contends that the court erred in finding that if the MOI

> "is to be read with section 63(2) of the Companies Act to permit virtual meetings, that interpretive approach must be applied consistently to all the relevant provisions of the MOI [and that] the MOI cannot be read in a technology-accommodating way in relation to the holding of members meetings, but in a literal way in relation to objections".[10]

[25] It was this particular finding, the Homeowners Association contends, that laid the basis for the conclusion that the objection provision in clause 2.21.1.1 must be interpreted to apply both to in-person and virtual meetings.

[26] The Homeowners Association enjoined the court to apply the leading decision on the general approach to interpretation in *Natal Joint Pension Fund v Endumeni Municipality*, where Wallis JA held:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of

[10] Main judgment para 25.

> grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[11]

[27] I agree that *Endumeni* helpfully captures the interpretive approach required, taking into account in particular the language, the context and the purpose of the MOI.

[28] In answer to a question from the court during hearing of the application for leave to appeal, the applicant submitted that the right to hold virtual members' meetings arises exclusively from section 63(2) of the Companies Act.

[29] However, this was not the applicant's pleaded case. The applicant's case, as originally pleaded and argued, invoked both the provisions of the MOI and section 63(2) of the Companies Act as the basis of the power of the directors to call and conduct virtual members' meetings. It adopted an approach to the MOI in which the provisions relating to the holding of meetings must be interpreted as applying to virtual meetings.

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[11] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

a. The applicant stated that that the directors are "of the view that virtual meetings accorded with the requirements of <u>both the MOI</u> and the Companies Act" (emphasis added).[12]

b. When dealing with the adjournment of several AGMs that were being held virtually for lack of quorum, the applicant stated that it adjourned the meetings to be held again on a virtual platform <u>in terms of clause 2.16.1.3</u> of the MOI, which provides inter alia for an adjourned general meeting to be held "at the same time and place".[13] The 'same place' was accordingly the same virtual platform.

c. When dealing with online voting, the applicant invoked clause 2.17.5 of the MOI, which provides for voting by show of hands unless a poll is demanded, to argue that the respondents were incorrect to insist that voting must be conducted initially by a show of hands.[14] In other words, in seeking relief permitting online voting, the applicant invoked the provision of the MOI relating to voting, read with section 63(2) of the Companies Act.

d. In its heads of argument in the main application, the applicant argued that clause 2.12 of the MOI "places the convening of general meetings of the Applicant squarely in the hands of its directors" and relied on clause 2.12.3 which provides that such meetings are to be held "at such time and place as the Directors shall determine".[15] The applicant then quoted the provisions of section 63(2) of the Companies Act, which permit virtual meetings unless prohibited by a company's MOI, before arguing:

> "The MOI, which was adopted before COVID, makes no provision for the holding of members meetings of the Applicant virtually. It does not, however, prohibit the holding of members meetings virtually and nor does it limit the power and discretion

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[12] Applicant's Answering Affidavit in Respondents' Counter-Application p 081-20 para 54.

[13] Founding Affidavit p 02-33 para 90 (regarding the 2021 AGM); Founding Affidavit 02-33 para 92 (regarding the 2022 AGM); Founding Affidavit 02-10 para 30 (regarding the 2023 AGM).

[14] Applicant's Answering Affidavit in Respondents' Counter-Application p 081-24 para 68.

[15] Applicant's heads of argument in main application p 088-17 paras 34-35.

> of the directors to hold members meetings <u>at such time and place</u> as they may determine."[16] (emphasis added)

e. Accordingly, the applicant's interpretation of 'place' in clause 2.12.3 of the MOI included its preferred virtual platform.

[30] Accordingly, the Homeowners' Association pleaded case in the papers and the case that it advanced in argument in the main application sourced the directors' power to hold members meetings on a virtual platform in *both* the MOI and section 63(2) of the Companies Act. The Applicant's approach was to read the provisions of the MOI relating to giving notice, adjournments and voting to apply to virtual meetings. The applicant's approach was therefore that "place" in clause 2.12.3 of the MOI includes a virtual platform and that a "poll" in terms of clause 2.17.5 includes a poll conducted on a virtual platform.

[31] In the main judgment, I concluded that the Homeowners Association was correct in its approach to the MOI and the Companies Act; that the MOI must be interpreted with section 63(2) to permit virtual meetings and its provisions relating to members meetings must all be interpreted accordingly.

[32] The applicant's new approach at the leave to appeal stage is that the power to hold virtual meetings arises only from the Companies Act, severed from the MOI. This argument is advanced to enable the applicant to embrace its success in the main judgment regarding the right to hold virtual members' meetings, while still challenging the conclusion that clause 2.21.1.1 relating to members' objections applies to virtual meetings.

[33] However, the new argument is both inconsistent with the applicant's pleaded case, as noted above, and legally untenable on the language, context and purpose of the provision.

[34] The applicant argues that the word "address" in clause 2.21.1.1 of the MOI dealing with objections to meetings refers only to a physical address.

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[16] Applicant's heads of argument in main application p 088-18 para 38.

[35] Clause 2.21 of the MOI, which deals with giving notice of members meetings in the first place, also uses the same word, “address”.

> “[m]embers’ meetings shall be held within the magisterial district in which the HOA is situated unless it is determined otherwise by the Directors and notice of the address at which the meeting is to be held, which address falls outside the magisterial district in which the scheme is situated, is clearly stipulated in the notice calling the meeting”.

[36] The applicant gave notice of the ill-fated virtual AGM under clause 2.21, including stating that the meeting would be held virtually.

[37] On the applicant’s argument, “place” in clause 2.12.3 and “address” in clause 2.21 of the MOI, both relating to holding members’ meetings, must be applied to meetings that the directors decide to hold on a virtual meeting; but the same word “address” in the objection provision of clause 2.21.1.1 of the MOI must be read literally to refer to a physical location.

[38] Section 5(1) of the Companies Act requires that courts interpret and apply the Act to give effect to the purposes set out in section 7. In terms of section 7(i), one of the purposes of the Companies Act is to “balance the rights and obligations of shareholders and directors within companies”. In light of this statutory interpretive injunction, a court is required to prefer an interpretation that balances the rights of shareholders and directors over an interpretation that does not, including in interpreting and applying section 63(2) alongside the relevant provisions of the MOI, in particular clause 2.21.1.1.

[39] An approach that interprets and applies all the other relevant provisions of the MOI relating to calling and holding members’ meetings so as to apply to virtual meetings, but restricts clause 2.21.1.1 and the right of members to object to in-person meetings not fails to promote a balance between the rights of shareholders and directors. It does the opposite, creating an unjustifiable asymmetry.

[40] In the circumstances, the interpretation contended for by the Homeowners Association:

a. requires virtually identical language in the MOI relating to “place” and “address” to be interpreted to apply to both in-person and virtual meetings when conferring powers on directors, but only to in-person meetings in respect of members’ right to object to the “address” of a meeting;

b. is inconsistent with the approach originally pleaded and argued by the Homeowners Association in the main application, which involved applying provisions of the MOI relating to the calling and conduct of members’ meetings to apply equally to virtual meetings;

c. is at odds with the interpretive injunction imposed by the Companies Act to seek to “balance the rights and obligations of shareholders and directors”; and

d. would lead, in the language of *Endumeni*, to ‘insensible and unbusinesslike results’ and undermine the purpose of the MOI.

[41] I therefore find that there is no reasonable prospect that another court would conclude that clause 2.21.1.1 is applicable only to in-person meetings.

Order

[42] I have concluded that the applicant is unable to establish that there is a reasonable prospect that another court would find differently. Leave to appeal must accordingly be refused, with costs to follow the result.

[43] The following order is granted:

1. The application for leave to appeal is dismissed.

2. The applicant is directed to pay the respondents’ costs on Scale A, including the costs of two counsel.

[redacted]

J BRICKHILL

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 18 May 2026.

DATE OF HEARING: 7 April 2026

JUDGMENT SUBMITTED FOR DELIVERY: 18 May 2026

APPEARANCES:

For the Applicant: Adv GF Porteous,
instructed by Tonkin Clacey Inc.

For the Respondent: Adv P Mokoena SC, Adv S Msimanga and Adv N Kgaka,
instructed by Msikinya Attorneys & Associates.