

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

09/10/2023 _____

CASE NO: 2021/36175

In the matter between:

EDMUNDS, NEIL JOHN

First Applicant

SCHULTZ, FRANZ JOSEPH

Second Applicant

and

SUPREME MOULDINGS INVESTMENTS (PTY) LIMITED

First Respondent

SUPREME MOULDINGS (PTY) LIMITED

Second Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The applicants seek leave to appeal my decision handed down on 5 June 2023. Although the application for leave to appeal was timeously launched on 27 June 2023, it was only last month, September 2023, that I was approached for dates for the hearing of the application. The application was heard within some two weeks of the approach.
2. The Supreme Court of Appeal in *Ramakatsa and Another v African National Congress and Another*¹ sets out the test as to whether there is a reasonable prospect of success on appeal as envisaged in section 17(1)(a) of the Supreme Courts Act, 2013:

“Leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. ... I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. ... The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding.

¹ [2021] ZASCA 31 para 10. My emphasis.

A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

3. The main grounds upon which the applicants submit that I erred are that:

3.1. I erred in finding in that there does not appear to have been any discernible prejudicial effect caused by the impugned irregular transactions on the value of Supreme Mouldings, and in turn on the value of Investments and the applicants' minorities shareholding in Investments;

3.2. I erred in *“in looking at actions and/or facilities and/or ‘upside of the benefits’ and/or ‘wider commercial view’ outside the oppressive or prejudicial conduct complained of to determine the effect of such oppressive or prejudicial conduct towards the applicants”*.

4. These two grounds, which are related, essentially are that I should have confined myself to what the applicants contended was the negative effect that the impugned transactions had on the value of Supreme Mouldings, and therefore indirectly on their shareholding in Investments as the holding company of Supreme Mouldings, and that I should not have looked at the upside the impugned transactions had on Supreme Mouldings, and therefore indirectly on their shareholding in Investments. The applicants may not have posited their challenge as starkly as this, but this is what it amounts to.

5. I am not of the opinion that this is a sound rational basis for the conclusion that there are prospects of success of appeal. In my view, this blinkered approach advanced by the applicants to look only at the negative consequences that the impugned transactions may indirectly have had on their shareholding in Investments is unsustainable, for the reasons given in my judgment, such as in paragraphs 24 to 29 and 33.

6. As a fallback position, the applicants submitted that, if a 'wider commercial view', is to be taken, I in any event erred by not taking into account other reasons why the conduct complained of may be unfairly prejudicial. But in doing so the applicants lose sight of what they plead in their founding affidavit is the effect of the conduct of which they complain, which is negative effect the impugned transactions that took place in Supreme Mouldings had on their minority shareholding in Investments.² The applicants cannot under the rubric of the court taking a 'wider commercial view' bring into account other reasons why the conduct complained of may be unfairly prejudicial. I considered the 'wider commercial view' in assessing whether the conduct complained of is unfairly prejudicial in the manner described by the applicants, which is the effect of the impugned transactions on the value of their minority shareholding in Investments.

7. Many of those factors that the applicants list that I should have taken into account in adopting a 'wider commercial view', as well as the remaining grounds set out in the application for leave to appeal, conflate

² See paragraph 16 of my judgment.

the applicants' interests as minority shareholders in Investments, which is what the case is about, with what their interests may have been as minority shareholders in Supreme Mouldings where the impugned conduct occurred, but which is not what the case is about. Although the applicants as minority shareholders in Investments accepted that they would have to show that the impugned conduct impacted indirectly on their minority shareholding in Investments, they appear to lose sight of this in their grounds for leave to appeal, which raise issues that may have affected them as minority shareholders in Supreme Mouldings, but not in Investments.

8. These further grounds in the application also seek to focus on the impugned conduct in and of itself – being the relevant financing transactions failing to comply with section 45 of the Companies Act, 2008 – rather than the indirect effect of that impugned conduct on the value of their minority shareholding in Investments, which is what their case is about.
9. The applicants' also submitted that I had erred, such as in paragraphs 11 and 32 of my judgment, in finding that a jurisdictional requirement for relief under section 163(1) was whether it would be just and equitable to grant the relief. The applicants submit that consideration of what was just and equitable only arises when considering what form of relief is to be granted under section 163(2). The applicants' submission continued that in taking the 'wider commercial view' I had and in particular in considering the 'upside' of the impugned conduct had had on the value

of their minority shareholding in Investments, that was not something I should have done when considering whether a case had been made out, particularly in an assessment of whether it would be just and equitable to grant relief.

10. I am not of the opinion that this is a sound rational basis why there is a reasonable prospect that an appeal court would find that I had erred when considering whether the jurisdictional requirements for section 163(1)(a) had been met, and in considering the factors that I did in deciding whether the impugned conduct was unfairly prejudicial in relation to the value of the applicants' minority shareholding in Investments. Section 163(1)(a) refers not merely to any act or omission of the company but to an act or omission that "*has a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant*". It is the result of the conduct that must be considered, and that result cannot be considered in isolation of those issues which the applicants submit I should not have considered.
11. As to whether I had erred in finding that a jurisdictional requirement is that it must be found that it is just and equitable for relief to be granted, in my judgment I referred to paragraph 23 of *Louw and Others v Nel* 2011 (2) SA 172 (SCA) as support for this requirement. While it may be so that that paragraph could be read as requiring a consideration of what is just and equitable only in relation to the specific form of the relief to be granted (and I am by no means persuaded that this is the correct reading of the judgment), the factors that I considered would in any

event be considered in an assessment of whether the conduct was unfairly prejudicial or unfairly disregarded the interests of the applicants.

I am not of the opinion that there is a reasonable prospect that an appeal court would find that a consideration of what was unfair must be done without a consideration of “*the upside of the benefits*” brought about by the impugned transactions and the “*wider commercial view*” of the effect of the impugned transactions on the value of the applicants’ minority shareholding in Investments.

12. As to the submission during argument by the applicants that the legal issue - whether the just and equitable requirement belongs to an assessment of whether a case has been made out for relief under section 163, or whether it only has a place in relation to the form of the relief to be granted - is something worthy of consideration on appeal, apart from this not being a ground of appeal in the application for leave to appeal, on the facts of this case it would make no difference, for the reasons set out above. This legal issue does not constitute a compelling reason for leave to appeal to be granted, in this matter.
13. The application for leave to appeal is dismissed with costs, the applicants to pay the costs, jointly and severally.

Gilbert AJ

Date of hearing: 27 September 2023

Date of judgment: 9 October 2023

Counsel for the applicants: Adv G V Meijers

Instructed by: Louw Louw Inc

Representative for the respondents: K J van Huyssteen
(Attorney)

Fluxmans Attorneys