THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Msimbithi Investments (Pty) Ltd and Others v African Legend Investment (Pty) Ltd and Others: 628/2023 [2025] ZASCA 61 (14 May2025)

Today the Supreme Court of Appeal, by a majority of three to two, handed down judgment by electronic means. The matter arose from a struggle for control of African Legend Investments (Pty) Ltd (ALI). Four related applications served before the Gauteng Division of the High Court, Johannesburg (the high court) and were heard together by Moorcroft AJ.

Two groupings emerged in the struggle. The first was headed by the founder of ALI, one Mr Ramano (Ramano) who, at the relevant time, was a shareholder and a director. Some eight other shareholders sided with Ramano. The other was headed by the Chairperson of ALI, one Mr Ahmed (Ahmed). The balance of the directors sided with Ahmed.

ALI was the ultimate holding company of Off the Shelf Investments 56 (RF) (Pty) Ltd, the second respondent (OTS56). During 2000 to 2001, OTS56 acquired a 23 per cent shareholding in Astron Energy (Pty) Ltd (Astron). The purchase price of R782 million was funded by way of vendor finance by Chevron Global Energy Incorporated (CGEI). CGEI granted OTS56 a pre-emptive right to acquire a further 75 per cent of the shares of Astron as well as the entire shareholding of Astron Botswana (Pty) Ltd (Astron Botswana). When CGEI wished to sell, it invited OTS56 to exercise its pre-emptive right but OTS56 lacked the finance to do so. An agreement was concluded between the 12th respondent, Glencore South Africa Oil Investments (Pty) Ltd and Glencore Energy UK Ltd (together Glencore) on the one hand, and OTS56 on the other. This was styled a Pre-Emption Framework Agreement (the Framework agreement).

The Framework agreement had essentially three stages to it. Glencore funded it by way of an exchangeable loan agreement in the sum of approximately USD1.1 billion. This was termed Transaction 1 and required Competition Commission approval. When that Transaction closed, OTS56 would on-sell the acquired shares and other assets to Glencore as soon as possible. The purchase price would be offset against the loan of approximately USD1.1 billion. This was termed Transaction 2 and also required approval by the Competition Commission and that of the shareholders of ALI by special resolution. OTS56 undertook to do nothing to delay the closing and to support it. Once that Transaction closed, OTS56 was granted the option of acquiring a further 7 per cent of the issued share capital of Astron and up to 30 per cent of that of Astron Botswana within 12 months of the closing of Transaction 2 at the same price paid by Glencore SA for the shares acquired from CGEI via OTS56.

After Transaction 1 closed, Glencore wrote to OTS56 saying, ‘We . . . agree that at any time between the date of this letter and T2 you may make to us for our consideration in good faith a commercially

attractive offer of an acquisition by you of the Shares.' Ramano interpreted this to grant OTS56 an option to acquire the shares if it could raise the finance. Glencore disagreed on good grounds, but Ramano thereafter set about causing OTS56 to attempt to delay the closing of Transaction 2.

The opposition of Ramano to involvement with Glencore had led him to request the calling of a shareholders meeting of ALI which was to take place on 27 February 2020. Ramano placed on the agenda a resolution providing for the replacement of the directors of ALI other than himself by directors aligned with him. A resolution was taken by a majority of directors of ALI by way of round robin on 25 February 2020. This resolved to issue shares of ALI to Astron Trust against payment of R24 million. Those funds would allow OTS56 to place a deposit for 26 per cent of the shares of Astron Botswana. OTS56 did not otherwise have the finance to exercise its option within 12 months of Transaction 2 closing, being 7 April 2020.

In the first application, the Ramano group sought an order setting aside the resolution and all actions which stemmed from it. First, it contended that proper notice had not been given. This ground was rejected in the high court and the Supreme Court of Appeal. Secondly, it contended that the true purposes of the resolution were to prevent the removal of the Ahmed group from the board of ALI and the removal of Ramano at the shareholders meeting two days later. It was held by both courts that that case had also not been made out. It was held that the dominant purpose of the resolution was to place OTS56 in a position to exercise its option to acquire shareholding in Astron Botswana, which, at the outset of the Framework agreement and at all times thereafter was seen by all the directors, including Ramano, to benefit OTS56. Finally, it contended that the purpose was not a rational one. This, too, was rejected. As a result, the Supreme Court of Appeal dismissed the appeal of the Ramano group against the high court order dismissing its application.

The final two applications related to actions taken by ALI in 1998. A resolution had granted Ramano 40 per cent of the voting interest in ALI despite holding only 7 per cent of the share equity. It was contended that that shareholding had been issued contrary to the terms of the resolution in question. The high court held that it was indeed an invalid action. However, the Ramano group had counter-applied, requesting the high court to validate the share issue in terms of the provisions of s 97 of the Companies Act 51 of 1973. The high court did so, listing some eleven considerations in favour of doing so. The Ahmed group was unable to submit that the strict discretion accorded to the high court had not been properly exercised and the Supreme Court of Appeal dismissed the Ahmed group's application to set aside that share issue.

The main counter-application by the Ahmed group sought a declaration that Ramono was a delinquent director. Despite agreeing in a meeting and being given legal advice to the effect that Glencore was only obliged to consider an offer and had not granted a binding option, Ramano set about delaying the Competition Commission approval of Transaction 2 as well as delaying the adoption of the relevant special resolutions by the shareholders of ALI in the hope of raising finance so as to buy the shares from Glencore. In so delaying, he placed OTS56 in breach of its obligations and at risk of an action for damages. This, along with other actions, such as deliberately misleading the board of OTS56 that its lawyer had told him that the letter in question granted an option and holding himself out to shareholders that he remained the chairperson of ALI when he had been removed, was held to breach his fiduciary duties as a director of OTS56. The Supreme Court of Appeal set aside the high court's order dismissing the application of the Ahmed group to declare Ramano a delinquent director and granted such a declaration for a period of seven years in terms of the provisions of the new Companies Act.

The dissenting judgment opined that it was of significance that the deponent to the main application and the counter-application (Ahmed) had admitted that the opposition of the main application and the legal basis of the counter application were based on intertwined facts. The dissenting judgment observed that when there are material factual disputes on essential issues, it is impermissible to select common cause facts and to predicate an outcome on the basis of such common cause facts. This would be contrary to the trite principle that evidence that is material to the dispute must be considered in totality. The dissenting judgment reasoned that there were foreseeable material disputes of facts on essential issues relating to both the main application and the counter application. Such factual disputes were self-evident from the various allegations made by the parties, and were also discernible from the correspondence exchanged and the minutes of various meetings. The accuracy of some of the minutes was disputed. The dissenting judgment opined that since there were probabilities and improbabilities in both versions, it was pointless to analyse the various allegations, minutes, correspondence and other documentary evidence in detail. It stated that a conclusion that the dominant purpose of the resolution was to place OTS56 in a position to exercise its option to acquire shareholding in Astron Botswana

could not be made in the face of materially disputed facts. Like the high court, the dissenting judgment found that there were material factual disputes as to whether Ramano was delinquent or merely misinformed or acting on incorrect advice in his interpretation of the letter in which Glencore had undertaken to consider a commercially attractive offer that OTS56 could make in good faith for the acquisition of shares.

The dissenting judgment opined that the Ahmed group had not made out a case justifying an order declaring Ramano to be a delinquent director. This was due to extant material factual disputes on essential issues, which rendered the counter-application irresoluble on the papers. According to the dissenting judgment, the high court had correctly dismissed the counter-application. The dissenting judgment reasoned that since the facts supporting the main and counter-application were intertwined, the main application too ought to have been dismissed on the grounds of irresoluble factual disputes on essential issues.

The dissenting judgment concluded that since the high court had dismissed the counter-application on account of material factual disputes which could not be resolved on affidavits, the dismissal of the counter-application on those grounds was not appealable because (i) the order granted by the high court did not finally dispose of the matter, and (ii) it was not in the interests of justice to entertain the cross-appeal. For all those reasons, the dissenting judgment would have dismissed the cross-appeal with costs, including the costs of two counsel.

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