

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER

23819/2009

DATE

2011-04-01

5 In the matter between

MOHAMMED AZEEM GAFFOOR N.O.

Applicant

AYESHA-BI PARKER N.O.

and

VANGATE INVESTMENTS (PTY) LTD

Respondent

10 **AND 29 OTHERS**

J U D G M E N T

KOEN, AJ:

15 This is an application for leave to appeal a judgment which was delivered on 17 February 2011 in which I exercised the discretion vested in a court by the provisions of Section 115 of the Companies Act 61 of 1973.

20 It is trite that in applications of this kind the test is whether it can be said that the applicant enjoys reasonable prospects of success on appeal. In order to decide this question it is necessary, therefore, firstly to determine the nature of the discretion vested in the court by the provisions of Section 115 of the Act. This is so because it was held in Khosis

25 01:04:2011/09:42-09:46/AVE

/...

23819/09

Community, *Lohatla v Minister of Defence* 2004 (5) SA 494 (SCA) that "The distinction between a narrow and a wide discretion is important especially on appeal. A court of appeal subject to its 'due deference' obligation to a value-judgment of a lower court has less constraints when hearing an appeal involving a value judgment (wide discretion) than in the case of an appeal against the exercise of a narrow discretion" (at 499 D to E).

10 In *Botha v Fick* 1995 (2) SA 750 (AD) the discretion involved in this case was described in the following terms "Die hof het 'n wye diskresie by 'n aansoek ingevolge hierdie artikel om toe te sien dat billikheid en geregtigheid geskied" (at 780 C). All of the relevant facts and circumstances have to be taken into consideration in the exercise of this discretion. Section 115 also requires a Court to decide whether justice and fairness dictate that in all the circumstances of the case an order rectifying a share register should be made. A value judgment must be made in the light of the facts of the case.

20

I think it follows that the discretion vested by the section is a wide one and that an appeal court will thus be less constrained in the exercise of its appellate jurisdiction than would be the case if the discretion was a narrow one. I have given careful thought to the submissions made by counsel for the applicant.

25

01:04:2011/09:42-09:46/AVE

/...

I am persuaded that there is a reasonable prospect, in the light of the facts which I have endeavoured to set forth fully in my judgment and against which the discretion must be exercised that there are reasonable prospects of success on appeal.

5 In the circumstances I think that the application for leave to appeal should succeed.

The prescription point raised in this matter is potentially decisive of this case. The question seems to be unresolved in our law. The parties were therefore agreed that if leave to
10 appeal were to be granted it ought to be granted to the Supreme Court of Appeal. I think that this is a correct approach.

I therefore make the following order: LEAVE TO APPEAL TO
15 THE SUPREME COURT OF APPEAL IS GRANTED. COSTS
ARE TO BE COST IN THE APPEAL.

20

A handwritten signature in blue ink, appearing to be 'AJ Koén', is written over a horizontal dashed line.

KOEN, AJ

25