

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 48495/2021

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: NO

DATE: 11 SEPTEMBER 2026

SIGNATURE

A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes.

In the matter between:

ROY MULEYA

Applicant

and

THE COMMISSIONER FOR THE SOUTH

Respondent

AFRICAN REVENUE SERVICE

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is electronically circulated to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **11 September 2026**.*

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MBOWENI AJ

INTRODUCTION

[1] This is an application for leave to appeal against the judgment and order of this Court delivered on 8 June 2026, in terms of which the rule nisi issued on 29 October 2025 was confirmed and the estate of the Applicant for leave to appeal, Mr Roy Muleya ("Muleya"), was placed under final sequestration.

[2] In the principal judgment, this Court concluded that the Commissioner for the South African Revenue Service ("SARS") had established the jurisdictional requirements for a final sequestration order contemplated in section 12(1) of the Insolvency Act 24 of 1936.

[3] In particular, the Court found that SARS had established claims arising from the customs debt and the assessed income-tax liabilities; that the disputes advanced by Muleya did not attract the operation of the principle in ***Badenhorst v Northern Construction Enterprises (Pty) Ltd***¹; that the Commissioner possessed the requisite locus standi; that the objection based upon section 177(3) of the Tax Administration Act 28 of 2011 ("the TAA") could not be sustained; that factual insolvency had been established; and that there was reason to believe that sequestration would be to the advantage of creditors.

[4] Muleya now seeks leave to appeal against that judgment and the resultant final sequestration order.

¹ 1956 (2) SA 346 (T)

[5] It is unnecessary for purposes of this judgment to reconsider every finding made in the principal judgment. The question before this Court is narrower: whether the statutory threshold for leave to appeal has been satisfied.

THE TEST FOR LEAVE TO APPEAL

[6] Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal may be granted only where the Court is of the opinion that—

(a) the appeal would have a reasonable prospect of success; or

(b) there is some other compelling reason why the appeal should be heard, including the existence of conflicting judgments on the matter under consideration.

[7] The test requires more than the mere existence of an arguable case or a remote possibility that another court may disagree with the judgment. There must be a sound and rational basis for concluding that there are reasonable prospects of success on appeal.

[8] In ***Ramakatsa and Others v African National Congress and Another***², the Supreme Court of Appeal confirmed that the enquiry requires a dispassionate consideration of the facts and the law and whether a court of appeal could reasonably arrive at a conclusion different from that reached by the court of first instance.

[9] Similarly, ***S v Smith***³ emphasises that the prospects must be realistic rather than remote and that there must be a sound and rational foundation for concluding that the proposed appeal may succeed.

[10] Where the Court is not persuaded that reasonable prospects of success have been established, section 17(1)(a)(ii) nevertheless requires consideration of whether there is some other compelling reason why the appeal should be heard. An important question of law or a discrete issue of wider importance may constitute such a reason, although the merits remain material to that enquiry: ***Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd and Ramakatsa***.

² [2021] ZASCA 31.

³ 2012 (1) SACR 567 (SCA)

APPLICATION OF THE TEST

[11] I remain satisfied with the conclusions reached in the principal judgment. That, however, is not the test which I am presently required to apply. The fact that a court remains persuaded of the correctness of its judgment does not preclude it from recognising that another court, applying the law to the same facts, may reasonably reach a different conclusion.

[12] This matter raises a number of interrelated questions concerning the intersection between the Insolvency Act, the TAA and the Customs and Excise Act 91 of 1964. Certain of those questions have consequences extending beyond the immediate dispute between the parties.

Section 177(3) of the Tax Administration Act

[13] One of the issues raised by Muleya concerned the proper interpretation and operation of section 177(3) of the TAA and, in particular, whether SARS was required to obtain leave before instituting sequestration proceedings.

[14] In the principal judgment this Court rejected the contention that section 177(3) requires a separate preliminary application for leave as a jurisdictional prerequisite to sequestration proceedings.

[15] The Court reasoned that the provision must be interpreted textually, contextually and purposively as part of the collection machinery established by the TAA, and concluded that the construction advanced on behalf of Muleya would introduce an additional procedural layer which was not clearly required by the statute.

[16] On reconsideration for purposes of leave to appeal, I am satisfied that the proper interpretation of section 177(3), particularly its relationship with sequestration proceedings under the Insolvency Act, raises a sufficiently important question of statutory interpretation for consideration by an appellate court.

[17] There is, in my view, a reasonable prospect that another court may adopt a different construction of the provision and of the procedural protection which it affords a taxpayer before sequestration proceedings are employed as a mechanism for the recovery of a tax debt.

The Badenhorst principle and the disputed debts

[18] A further material issue concerns the application of the Badenhorst principle to the debts relied upon by SARS.

[19] Muleya disputed both the factual and legal foundations of the customs liability. He contended, amongst other things, that SARS had not established the liability of Afri Teecee and had not established the jurisdictional facts necessary to impose personal liability upon him under section 103 of the Customs and Excise Act.

[20] This Court found that, although disputes existed, they were insufficient to establish a bona fide dispute on reasonable grounds of the character contemplated in Badenhorst and the subsequent authorities.

[21] The distinction between determining whether SARS has established a claim for purposes of sequestration and impermissibly determining the merits of a genuinely disputed underlying liability is an important one.

[22] I am persuaded that another court could reasonably conclude that the disputes concerning the foundation and extent of the customs liability were sufficiently substantive to engage the Badenhorst principle, particularly where personal liability for the substantial customs debt remained contested.

[23] Similar considerations arise in relation to the income-tax liability.

[24] The principal judgment accepted that the assessments remained operative notwithstanding the pending statutory appeal and that, in the absence of a suspension of payment, the “pay now, argue later” regime did not prevent SARS from relying upon the assessed liability for purposes of sequestration.

[25] That conclusion remains, in my view, supported by the statutory framework. Nevertheless, the relationship between an immediately recoverable assessed tax debt, a pending statutory challenge to the correctness of that assessment, and the Badenhorst principle raises an issue upon which an appellate court could reasonably take a different view.

[26] In particular, the fact that a tax debt is presently enforceable does not necessarily answer, without more, the separate insolvency-law enquiry whether that debt is bona fide disputed on reasonable grounds for purposes of sequestration.

[27] The interaction between these principles warrants consideration by an appellate court.

Factual Insolvency

[28] The Court also concluded that Muleya was factually insolvent. That conclusion was based upon the substantial liabilities established by SARS, considered together with the evidence concerning Muleya's financial position and the absence of a comprehensive statement of assets demonstrating an ability to meet liabilities exceeding R188 million.

[29] There is, however, a material relationship between that finding and the Court's treatment of the underlying debts.

[30] If an appellate court were to conclude that either the customs debt or a material portion of the indebtedness could not properly have been relied upon for purposes of sequestration, that conclusion may materially affect the factual-insolvency enquiry.

[31] There is consequently a reasonable prospect that the finding of factual insolvency may require reconsideration depending upon the appellate court's determination of the antecedent questions concerning indebtedness.

Advantage to creditors

[32] This Court found that the advantage-to-creditors requirement had been established, particularly having regard to the investigative powers which would become available to a trustee in relation to the transfer of property, trust structures, associated corporate entities and other financial transactions.

[33] I remain persuaded that the threshold applicable to advantage to creditors was met. However, that issue cannot entirely be divorced from the conclusions concerning indebtedness and insolvency. Should an appellate court reach a different conclusion on those foundational requirements, the exercise of the Court's discretion to grant a final order would necessarily require reconsideration.

WHETHER LEAVE SHOULD BE GRANTED

[34] A final sequestration order has substantial consequences. It effects a concursus creditorum, divests the insolvent of his estate and subjects that estate to the statutory insolvency regime.

[35] The seriousness of those consequences does not, standing alone, justify the granting of leave to appeal. It does, however, underscore the importance of appellate scrutiny where the statutory requirements for leave have otherwise been established.

[36] This matter does not concern a single narrow factual dispute. It raises questions regarding the interaction between tax-collection legislation and insolvency law; the proper construction of section 177(3) of the TAA; the application of the Badenhorst principle to tax and customs liabilities which remain the subject of substantive challenge; and the consequences of those questions for factual insolvency and the exercise of the sequestration discretion.

[37] Having reconsidered the matter dispassionately, I am persuaded that the threshold in section 17(1)(a)(i) has been met. There is a sound and rational basis upon which an appellate court could reasonably reach conclusions different from those reached by this Court on one or more of the material issues.

[38] In addition, the proper relationship between the statutory collection mechanisms available to SARS and the protections inherent in insolvency law raises questions of sufficient legal importance to constitute a further consideration favouring appellate determination.

[39] Nothing in this judgment should be understood as a reconsideration or withdrawal of the conclusions reached in the principal judgment. The enquiry at this stage is not whether this Court considers its judgment to have been wrong. It is whether the proposed appeal satisfies the statutory threshold prescribed by section 17 of the Superior Courts Act.

[40] I am satisfied that it does.

THE COURT TO WHICH LEAVE SHOULD BE GRANTED

[41] The remaining question concerns the forum to which leave should be granted.

[42] The proposed appeal concerns substantial questions of statutory interpretation and the interaction between three statutory regimes. The issues are not confined to the particular factual circumstances of Muleya but potentially bear upon the circumstances in which SARS may employ sequestration proceedings as a mechanism for the collection of disputed tax and customs liabilities.

[43] In those circumstances, I consider it appropriate that leave be granted to the full court of the High Court.

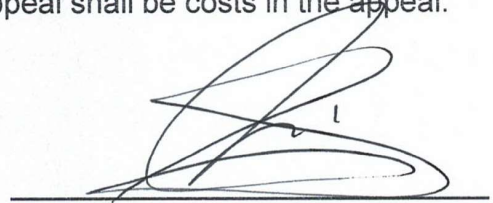
COSTS

[44] As the application for leave to appeal succeeds, the appropriate course is for the costs of the application for leave to appeal to be costs in the appeal.

ORDER

In the result, the following order is made:

1. The application for leave to appeal is granted.
2. The Applicant for leave to appeal is granted leave to appeal to the Full Court of the High Court, Pretoria against the whole of the judgment and order of this Court delivered on 8 June 2026.
3. The costs of the application for leave to appeal shall be costs in the appeal.



MBOWENI AJ
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Date of Hearing : 11 September 2026

Date of Judgment : 11 September 2026

Appearances:

Counsel for the Appellant : Adv PA Swanepoel SC and CA Boonzaaier

Instructed by Serfontein Viljoen & Swart Attorneys

Counsel for the Respondent : Adv HGA Synman SC and N Komar

Instructed by VDT Attorneys