IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 47603/2017

Reportable: ~~Yes~~ / No Of interest to other judges: ~~Yes~~ / No Revised: No Date: 27 November 2023 A B Bishop

In the matter between:

NQABA GUARANTEE SPV (PTY) LTD	First Applicant
ESKOM FINANCE COMPANY SOC LTD	Second Applicant
and	
KHAYELIHLE TRUST	First Respondent
DALINGCEBO EMMANUEL NGUTSHANE	Second Respondent

JUDGMENT—IN THE APPLICATION FOR LEAVE TO APPEAL

BISHOP AJ:

[1] On or about 8 November 2023, the first respondent, the Khayelihle Trust, and the second respondent, Dalingcebo Emmanuel Ngutshane, uploaded their notice of application for leave to appeal, which is dated

13 October 2023, on CaseLines. [1] The trust and Mr Ngutshane [2] have applied for leave to appeal against my prior judgment, dated 28 June 2023, which was uploaded onto CaseLines and thereby delivered on 29 June 2023, and which had effect from 10h00 on 30 June 2023. [3]

[2] The notice of application for leave to appeal was delivered materially out of time. [4] The trust and Mr Ngutshane have sought condonation for the late delivery of their notice of application for leave to appeal [5] on the basis that they were not aware that the judgment had been handed down, until Mr Ngutshane had a meeting with the sheriff. [6] Effectively, it is the trust's and Mr Ngutshane's case that the judgment, delivered by way of uploading it onto CaseLines, did not come to the trust's or Mr Ngutshane's attention at or about the time that it was delivered.

[3] As indicated in my prior judgment, Mr Ngutshane appeared on behalf

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1 CaseLines 24-1 to 24-16

2 CaseLines 24-1, par 1—*ex facie* the notice of application for leave to appeal, it appears as if both the trust and Mr Ngutshane have sought leave to appeal.

3 CaseLines 00-22

4 Compare uniform rule 49(1)(b)

5 CaseLines 24-2, par 3

6 CaseLines 24-2, par 3. CaseLines 27-3, par 6.3—the applicants described this as being when the sheriff served a writ of execution.

of the trust and himself at the prior hearing, [7] as was the case again in this application. I have considered the CaseLines system in preparing this judgment and it shows that Mr Ngutshane only obtained access thereto on 3 November 2023. That the trust and Mr Ngutshane did not have access to CaseLines, which automatically notifies the parties' attorneys, who are registered thereon in respect of the particular matter, that the judgment has been handed down, did not occur to me at the time of handing my prior judgment down. If it had, I would have made arrangements to have had it brought to the trust's and Mr Ngutshane's attention.

[4] An application for condonation principally concerns two aspects: namely, (i) a proper explanation for the delay; and (ii) a consideration of the prospects of success in the main application (in this instance, the application for leave to appeal). [8] Notwithstanding that the trust's and Mr Ngutshane's prospects of success in their application for leave to appeal have not as yet been evaluated herein, I propose adopting the same approach as that followed in ***Ikamva Architects***: [9] namely, in the interests of justice, to grant them condonation for the late

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[7] CaseLines 00-8 to 00-9, par 21; 00-22.

[8] The trust and Mr Ngutshane relied upon ***Melanie v Santam Insurance Co Ltd*** 1962 (4) SA 531 (A), 532C-D. Nqaba and EFC referred to van ***Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)*** 2008 (2) SA 472 (CC), par 22.

[9] ***MEC for Public Works, Eastern Cape and Another v Ikamva Architects CC*** 2023 (2) SA 514 (SCA), par 2

delivery of their notice of application for leave to appeal and to adjudicate the application for leave to appeal on its merits. The reason for the trust and Mr Ngutshane seeking condonation cannot fairly be blamed upon the trust or Mr Ngutshane. Although they did take a little longer than 15 days, [10] after becoming aware of the judgment, to file their application for leave to appeal, that delay was not significant. In the result, it is appropriate to direct that the costs of the application for condonation should follow the results of the application for leave to appeal. I now turn to the merits of the application for leave to appeal.

[5] The first ground relied upon by the trust and Mr Ngutshane, in seeking leave to appeal, [11] essentially concerns the accusation that Nqaba and the EFC fraudulently misrepresented, through non-disclosure, the true position to the trust, at the time that the loan agreement was concluded between the trust and the EFC. The misrepresentation pertained to two aspects: namely, (i) the failure to disclose that rule 46A would have no application, where the borrower of the funds on loan was a trust, in an application for a special executability order; [12] and (ii) the National Credit Act 34 of 2005 had no application to a credit agreement entered into with a trust.

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[10] Rule 49(1)(b) affords a party 15 days to file its application for lave to appeal.

[11] CaseLines 24-4 to 24-6, par 4.1

[12] CaseLines 00-17, par 38—I found that rule 46A did find application where the property was owned by a trust.

[6] When the merits of this matter were argued in the prior hearing, Mr Ngutshane, in arguing the matter, did not persist with these submissions, which had been raised in the supplementary affidavit, delivered on his and the trust's behalf on or about 25 July 2022. [13] In the application for leave to appeal, however, this point featured more strongly.

[7] This ground for leave to appeal, in my view, however, has no merit. Fraud is not easily proven. The trust and Mr Ngutshane alleged in their notice of application for leave to appeal that Nqaba and the EFC 'were duty bound to disclose material information'. [14] No facts to establish that duty appear from the papers of Mr Ngutshane and trust. I asked Mr Ngutshane, [15] during his argument in this application, to address me on what he contended the basis for this duty was. He could not say.

[8] *Ms Halgryn*, who appeared for Nqaba and the EFC, was not able to identify any basis for such a duty either. As she pointed out, rule 46A did not even exist [16] at the time that the loan agreement between the

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13 CaseLines 000-7, par 16 to 000-9, par 17 and 000-13, par 25

14 CaseLines 24-6, par 4.1

15 Mr Ngutshane again represented both the trust and himself in this application.

16 Rule 46A was published in GN R1272 of 17 November 2017 and became effective on 22 December 2017.

trust and the EFC was entered into on 24 August 2011—thus making it impossible for the EFC to have explained anything in regard thereto at the time.

[9] The issue to me is resoluble on the basis of a more fundamental approach. Mr Ngutshane relied in his heads of argument on ***Pretorius'*** case. [17] In this report, the following appears: [18]

> As to whether such a duty exists at common law, this is a more difficult question. Outside the type of contract designated as being *uberrimae fidei*
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> > 'there is in our law no general duty on contracting parties to disclose to each other any facts and circumstances known to them which may influence the mind of the other party in deciding whether to conclude the contract':
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> see *per* Fannin J, in ***Speight v Glass and Another*** 1961 (1) SA 778 (D), 781H; ***Hoffman v Moni's Wineries Ltd*** 1948 (2) SA 163 (C), 168. But as stated in an article entitled 'Fraudulent Non-disclosure' by M. A. Milluer in the *South African Law Journal* (1957) 177 at p 189, this does not mean that there are no exceptional cases in which, although the contract cannot be said to be labelled *uberrimae fidei*, the particular situation calls for disclosure. The learned author proceeds to say:
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> > 'The same relationship, and therefore the same duty of disclosure, can arise in any other negotiations which, in the particular case, are characterised by the involuntary reliance of the one party on the other for information material to his decision.'
>
> See also Spencer Bower, *Actionable Non-disclosure*, sec. 152, p 120.
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> An example of such a relationship is recognised in our law in the case of a latent defect of which a seller has knowledge. The omission to disclose gives rise to the *actio redhibitoria*, the absence of *dolus* being immaterial. Now it seems to me that there is an analogy here. The applicants must perforce rely on the directors to place before them all

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[17] CaseLines 28-31, par 1.28(iii) and (iv)—***Pretorius and Another v Natal South Sea Investment Trust Ltd (under judicial management)*** 1965 (3) SA 410 (W), 418E-F

[18] ***Pretorius***, 417I-419A

the available information material to their decision. The fact of the contract with the Nova company and the contents thereof were not available to the applicants. Clause 4 thereof constitutes a threat to the rights of the company to the land bought for the purposes envisaged. It is therefore in the nature of a latent defect in the shares. It was known to the respondent but not to the applicants, to whom it is not accessible. There is here an

> 'involuntary reliance of the one party on the frank disclosure of certain facts necessarily lying within the exclusive knowledge of the other such that, in fair dealing, the former's right to have such information communicated to him would be mutually recognised by honest men in the circumstances'.

See the article in *South African Law Journal* (1957) already referred to at p 189 (foot). I have come to the conclusion that there was a duty of disclosure in these circumstances.

Dealing with the final point, viz. whether the applicants would have made the offer to purchase had they known of the offending contract, the applicants say simply in para 26 of the petition:

> 'But for the said non-disclosure your petitioners would not have offered to acquire any shares in the respondent company.'

Eliasov and Meuller just as categorically deny this allegation. Can I resolve this issue in any way on the papers before me?

It is not sufficient to show that what was concealed was material. The person seeking relief must show on the probabilities that he would not have bought had he known of the facts that were concealed. In ***Poole and McLennan v Nourse*** 1918 AD 404 at 412, in the judgment of Wessels J (as he then was), in the Court below is the following passage:

> 'It is not enough for the purchaser to say "I would not have bought it had I known". The Court must find that under the circumstances of the case it is reasonable to suppose that he would not have bought.'

This seems to me to summarise the position and I would be entitled, I think, despite the denial of the directors, to find in favour of the applicants on this point that under the circumstances of the case it is reasonable to suppose that they would not have made the offer to buy had they known of the Nova contract. For this purpose I do not think I am entitled to approach the contract with the eyes of a lawyer, nor to surmise what explanations would have been given by Eliasov if at the relevant time he had made a proper disclosure. The terms of the contract are of such a nature, and I need not particularise further, that in my view it is reasonable to suppose the applicants would not have made the investment.

[10] (Own emphasis added.) [19] It is clear from both this case and that of ***ABSA*** [20] that Mr Ngutshane and the trust had to prove the existence of the duty to speak, which they allege was on Nqaba and the EFC at the time that the loan agreement between the trust and the EFC was entered into. The misrepresentation relied upon by the trust and Mr Ngutshane was not, as the ***Pretorius*** and ***ABSA*** cases dealt with,

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[19] I have quoted from the decision that I have, because Mr Ngutshane's heads of argument—see CaseLines 28-31, par 1.28(iv)—contain a different quotation within the same passage, namely:

> A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognized by honest men in the circumstances.'

Upon further research, the above passage is actually from ***ABSA Bank Ltd v Fouche*** 2003 (1) SA 176 (SCA), par 5, where it was held that:

> A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (***Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management)*** 1965 (3) SA 410 (W) at 418E - F).

The context of this text was the following:

> [4] It is by now settled law that the test for establishing wrongfulness in a pre-contractual setting is the same as that applied in the case of a non-contractual non-disclosure (***Bayer South Africa (Pty) Ltd v Frost*** 1991 (4) SA 559 (A), 568F-I and 570D-G). In each case one uses the legal convictions of the community as the touchstone (***Carmichele v Minister of Safety and Security and Another*** 2001 (1) SA 489 (SCA), 494E - F applying ***Minister of Law and Order v Kadir*** 1995 (1) SA 303 (A), 317C-318J).
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> [5] The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context - a non-disclosure - have been synthesised into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (***Speight v Glass and Another*** 1961 (1) SA 778 (D), 781H-783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful (***BOE Bank Ltd v Ries*** 2002 (2) SA 39 (SCA), 46G-H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (***Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management)*** 1965 (3) SA 410 (W), 418E-F).
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> [6] Having established a duty on the defendant to speak, a plaintiff must prove the further elements for an actionable misrepresentation, that is, that the representation was material and induced the defendant to enter into the contract. In the case of a fraudulent misrepresentation, that must have been the result intended by the defendant (***Ex parte Lebowa Development Corporation Ltd*** 1989 (3) SA 71 (T), 103F-J).

[20] See footnote 15 above

a failure to make a *factual disclosure*, but rather a failure to give a legal opinion to the trust and Mr Ngutshane as to how the law might operate differently, in respect of rule 46A and the National Credit Act, when being applied to a trust or a natural person, which has defaulted on a loan agreement, secured by a mortgage bond.

[11] An opinion—however, not a legal opinion—has been held to constitute the basis for fraud. [21] The opinion must relate to a belief about a fact or facts; even those that may occur in the future. I have been unable to find any authority to support a contention that one contracting party is under an obligation to legally advise or to provide a legal opinion to

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[21] See ***Feinstein v Niggli*** 1981 (2) SA 684 (A), 695C-H, where it was held that:

> Now a representation, in order to found a cause of action for rescinding a contract for fraud, must relate to a matter of present or past fact. Hence, a statement of opinion about the future prospects of a business may for that reason not amount *per se* to an actionable representation if it turns out to be wrong. But Halsbury *Laws of England* 3rd ed vol 26 para 1520 rightly says that:
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> > 'a statement of expectation or a statement in the future tense may impliedly say something as to the existing position and so import an implied representation.'
>
> One of the illustrations given in note *(g)* thereto is most apposite here. In ***Re Pacaya Rubber and Produce Co Ltd, Burn's Application*** (1914) 1 Ch 542 at 549-550 it was held that a statement which was in itself merely an estimate of future profit amounted to a confirmation of an intended picture of an equipped and immediately workable property. And Kerr *Fraud and Mistake* 7th ed at 31 says:
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> > 'It is often fallaciously assumed that a statement of opinion cannot involve a statement of fact. But, if the facts are not equally known to both sides, a statement of opinion by the one who knows the facts best often involves a statement of a material fact, for he implicitly states that he knows facts which justify his opinion.'
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> (That is taken from the *dicta* of Bowen LJ in ***Smith v Land and House Property Corporation*** 28 Ch D 7 at 15.)
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> In any event, a person's statement of opinion or forecast of the future success or profits of a business may, at the very least, amount to a representation as to his then state of mind, ie that he actually believes in what he says, for, according to the well-known aphorism of Bowen LJ in ***Edgington v Fitzmaurice*** (1885) 29 Ch D 459 (CA) at 483,
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> > 'the state of a man's mind is as much a fact as the state of his digestion'.
>
> See also ***Van Heerden and Another v Smith*** 1956 (3) SA 273 (O).

the other contracting party prior to entering into a contract with the other party; much less that a failure to do so might give rise to claim or defence of fraudulent inducement. The trust and Mr Ngutshane must fail on this point on this basis alone.

[12] This finding is, in my view, fortified by the very provisions of the loan agreement, which were drawn to Mr Ngutshane's attention during the hearing of this application: namely, those appearing just above his signature, which he made on behalf or the trust, and which read: [22]

> 23.8 Each of the Parties hereby respectively agrees and acknowledges that:
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> 23.8.1 it has been free to secure independent legal advice as to the nature and effect of each provision of this Agreement and that it has either taken such independent legal advice or has dispensed with the necessity of doing so;
>
> 23.8.2 each provision of this Agreement is and reasonable in all the circumstances and is part of the overall intention of the Parties in connection with this Agreement;
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> 23.8.3 ...
>
> 23.9 The Borrower acknowledges that he understands and appreciates:
>
> 23.9.1 the risks and costs of obtaining the Loan and entering into this Agreement;
>
> 23.9.2 his rights and obligations in terms of this Agreement. ...

[13] The obligation to take legal advice was acknowledged by

[22] CaseLines 02-42, par 23.8 to 23.9

Mr Ngutshane in the loan agreement to be that of the trust. Had he taken such advice, as the trust's representative, he would known the legal position vis-à-vis the trust and himself. There is no indication that he attempted to take such advise—in fact, the case argued by him is quite to the contrary.

[14] Further considerations that render the accusations of fraud implausible are that: (i) payments were made in terms of the loan agreement over a period of years; [23] and (ii) the trust and Mr Ngutshane, in the answering affidavit, expressed their view, as follows: [24]

> We are willing to make appropriate arrangement with the Applicant to pay the arrears but we would like the Honourable Court to rule on whether the Applicant's failure to recognise the debt review process is legal and justified. We would also like the court to rule if the court order obtained from the Magistrate Court, which clearly includes the Applicant who never objected to the court for being included nor presented their case to the court despite a notice being sent to them, is incorrect ...

[15] This passage reflects the approach of the trust and Mr Ngutshane during the prior hearing before me: namely, they adopted the approach that, because Mr Ngutshane had obtained a debt review order from the Magistrates' Court in respect of his personal indebtedness, Nqaba and the EFC were precluded from obtaining the orders they sought in this matter against the trust and Mr Ngutshane. Secondly, this passage

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[23] CaseLines 00-4, par 6

[24] CaseLines 08-24, par 3.5.4

acknowledges the obligation by the trust and Mr Ngutshane to make appropriate arrangements to pay the arrears on the loan. There is further indication of such acknowledgement in the answering affidavit. [25]

[16] If the trust and Mr Ngutshane are to be taken at face value on these portions of their answering affidavit, then having given my judgment in respect of the debt review order and the question of interest, the trust and Mr Ngutshane ought by now to have entered into a payment arrangement with the EFC. There is no suggestion that this has happened.

[17] The position is quite to the contrary, in fact. During argument in this application it became apparent that Mr Ngutshane wishes to hold the EFC to the terms of the debt review order, but he himself acknowledged that he had not abided by the terms thereof. In fact, he conceded during argument that the last time that any payment on the loan account had been made was 29 July 2020 and he submitted that he had told the EFC that he would not abide by the debt review order while Nqaba and the EFC made demands upon him to make payment of amounts that they deemed were due.

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[25] CaseLines 08-26, par 3.5.6

[18] During his address in this application, Mr Ngutshane on several occasions accused the EFC of being heavy handed and a bully [26] with him in demanding the repayment of the loan by the trust, when (according to him) the EFC could easily afford to wait for the relatively small amount that was owed to it. He also expressed his refusal to be bullied by the EFC.

[19] In my view, the trust's and Mr Ngutshane's stance amounts to this: whatever the terms of the loan agreement with the trust are, whatever the terms of the debt review order might be, whatever the terms of this court's order are, neither he nor the trust will be pay any amount to the EFC at any time that does not suit them. This is obviously a position that is contrary to the law.

[20] Even my attempts to engage Mr Ngutshane during the hearing on a purely practical basis to try and find a way to settle the arrears and reinstate the loan agreement were unsuccessful—in short, there is no money to settle the arrears and there is no means open to the trust or Mr Ngutshane to settle the outstanding amount owed to the EFC, except by selling the mortgaged property.

[21] I conclude that there is no merit in this first ground upon which the trust

[26] See also CaseLines 24.9, par 4.2.6

and Mr Ngutshane sought leave to appeal.

[22] The second ground upon which the trust and Mr Ngutshane sought leave to appeal essentially amounted to a reiteration of their argument concerning the debt review order, which had been made in detail in the prior hearing. Neither in the notice of application for leave to appeal nor in the heads of argument submitted on behalf of the trust and Mr Ngutshane , [27] not even in Mr Ngutshane's oral address, was there any demonstration that on this aspect I have erred in the conclusions reached by me, in particular in paragraphs 18 to 27 of my judgment; nor did Mr Ngutshane indicate why another court might reasonably come to a different finding to that which I came [28] or that there is some other compelling reason why the appeal should be heard.

[23] Mr Ngutshane's fixation with the EFC's alleged refusal to participate in his debt review application misses the point entirely: whatever gave rise to the granting of that order (ie, the participation therein by the EFC or not) is of no moment, while the order stands. And the order stands until set aside on appeal or review, or if rescinded. None of these procedures have been adopted by the EFC and so the debt

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[27] CaseLines 28-1 to 28-56

[28] See ***Ramakatsa and Others v African National Congress and Another*** (724/2019) [2021] ZASCA 31 (31 March 2021), par 10, for what seems to be the most recent formulation of the test in an application for leave to appeal.

review order stands. It is the application of that order that is of significance.

[24] I held in my prior judgment that the order could at best prevent the granting of an order in Nqaba and the EFC's application against Mr Ngutshane, but it could not prevent an order being granted against the trust, [29] since the debt review application, and the order that flowed from it, related to Mr Ngutshane's estate, not the indebtedness of the trust. This finding was not challenged by the trust or Mr Ngutshane and I am the view that another court would not come to a different finding on this aspect. This ground is, therefore, also without merit.

[25] The third ground for leave to appeal raised by the trust and Mr Ngutshane is an extension of the second ground. [30] There is nothing in the notice for leave to appeal, the heads of argument or the oral address of Mr Ngutshane which have persuaded me that this ground (which suffers the same defect as the second ground) has any prospects of succeeding, if argued before another court. This ground too is unsustainable.

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29 CaseLines 00-8, par 19

30 CaseLines 24-9, par 4.3

[26] The fourth ground raises the question of whether the EFC was entitled to increase the interest rate as it had. [31] The loan agreement between the trust and the EFC stipulates that: [32]

> The Loan shall bear interest at the rate stipulated in the Schedule. This rate is a variable interest rate fixed to JIBAR **("the reference rate")**, and may be varied in accordance with changes to the reference rate.

[27] Further, the loan agreement provides that: [33]

> Should the Borrower leave the employ of the employer, unless agreed otherwise in writing:
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> 4.3.1 the full outstanding amount of the Loan, including interest and fees, will become immediately due and payable; and
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> 4.3.2 the Borrower hereby authorises the Eskom Pension and Provident Fund ... unconditionally and irrevocably to pay any pension fund monies due to the Borrower at that date, limited to the settlement amount as calculated in clause 13 below, towards the settlement of the Borrower's indebtedness in terms of this Agreement.

[28] In my prior judgment, I recorded that: [34]

> He [Mr Ngutshane] deposed that it had come as a surprise to him when, on 17 May 2016, EFC had placed the trust on terms regarding the loan, as a result of the termination of his employment with Eskom; but the full outstanding loan became immediately due and payable upon the termination of his employment (unless otherwise agreed to in writing) in terms of clause 4.3 of the loan agreement and the trust became liable for penalty interest on any amount owing in terms of clause 5.6.1. The letter of [the] EFC makes reference to its rules, which afforded the trust 90 days, from date of Mr Ngutshane's

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31 CaseLines 24-9 to 24-10, par 4.4

32 CaseLines 02-26, clause 5.1

33 CaseLines 02-26, par 4.3

34 CaseLines 00-5 to 00-6, par 11

> termination, to transfer the loan and mortgage bond to another financial institution; as well as including an invitation to make arrangements with [the] EFC. These terms seem more benevolent to me [than] those of the loan agreement and seem to have operated to the trust's benefit.

[29] In addition to the interest being variable and the full amount being due, owing and payable, as indicated above, the loan agreement also provides that: [35]

> If the Borrower fails to pay any amount in terms of this Agreement on or before the due date, regardless of any agreement by the Company to defer payment of such amount/s:
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> 5.6.1 penalty interest at the same rate applicable to the Loan will be charged on the amount so owing; and
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> 5.6.2 the Company shall be entitled, in addition to and without derogating from such other rights as the Company may have under this Agreement, at its discretion to increase the rate of interest applicable to this Agreement to the maximum rate of interest permitted by the Act.

[30] I had also indicated in my prior judgment [36] that although Mr Ngutshane had complained that the instalment due, after the termination of his employment with Eskom, was unexplained and exorbitant, he did not allege that the interest charged by the EFC was usurious or illegal.

[31] Mr Ngutshane on behalf of the trust and himself contends that this finding of mine was an error, by virtue of what had been recorded by

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35 CaseLines 02-27, par 5.6

36 CaseLines 00-6, par 12

him in the trust's and his supplementary answering affidavit and in their heads of argument. [37]

[32] In the supplementary affidavit deposed to by Mr Ngutshane, he set out the following on this aspect: [38]

> When the 2nd Respondent left the employ of Eskom, the Applicants unilaterally increased the Mortgage Bond interest rate without conducting an affordability assessment and whether the interest rate changes will render the 2nd Respondent over-indebted as required by the National Credit Act. The changes in the credit agreement's interest rate were not in line with the Mortgage Bond agreement and recommended a new credit agreement as well as had no basis considering the Applicant's claim that the 2nd Respondent is not the judgment debtor.

[33] The provisions of the loan agreement permitted the increase in the interest rate. The obligation owed by the trust was to pay the capital and the interest. Nothing in the loan agreement affected any indebtedness of Mr Ngutshane, who owed no obligation in terms of the loan agreement, as I have indicated above. Therefore, all references to his over-indebtedness are without substance. His contention that the changes in the interest rate constituted a new credit agreement are also without substance.

[34] In the heads of argument filed by Mr Ngutshane, he contended that:

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37 CaseLines 24-9 to 24-10, par 4.4

38 CaseLines 000-6, par 13

(i) there was a unilateral and unlawful change effected to the credit agreement when the interest rate was increased; [39] (ii) Nqaba and the EFC were required to conduct a fresh affordability assessment in terms of s 81(2) of the National Credit Act, in respect of Mr Ngutshane, before increasing the interest rate applicable to the loan they had with the trust; [40] (iii) the arrears were calculated on the unlawfully and unilaterally adjusted interest rates and they had been unilaterally altered in conflict with the requirements of the National Credit Act; [41] (iv) Nqaba and the EFC had changed the interest rate from 9.25% to 13.5% without relying upon the loan agreement and thereby creating a new credit agreement; [42] (v) the loan agreement had no provision allowing for the unilateral alteration of the interest rate (nor did Mr Ngutshane's employment contract with Eskom);[43] and (vi) the Eskom Act makes no provision for interest rates. [44]

[35] From what I have referred to above, it is quite apparent that the loan agreement allowed EFC to vary the interest rate. There is no requirement, given that the loan agreement was between the trust and

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39 CaseLines 17-2, par 1.3.1

40 CaseLines 17-31, par 1.29.4

41 CaseLines 17-39, par 1.30.8.2

42 CaseLines 17-50, par 1.34

43 CaseLines 17-50, par 1.34.1

44 CaseLines 17-50, par 1.34.2

EFC, for the EFC to conduct an affordability test on Mr Ngutshane prior to altering the interest rate.

[36] Moreover, although it is said in the notice application for leave to appeal that my prior judgment was incorrect in recording that there was no allegation that the interest charged by EFC was usurious or illegal, it is clear from what I have set out above that that was not the attack made on the interest rate in the papers of the trust and Mr Ngutshane, but rather their line of attack amounted to a contention that affordability had to be assessed prior to the rate of interest being changed.

[37] Accordingly, I find that this ground for leave to appeal is also unsustainable.

[38] The balance of what purport to be grounds for leave to appeal, [45] are in essence nothing more than a regurgitation of the grounds already assessed, save for one additional aspect and that is a challenge to the court's jurisdiction on the basis that the application was heard in this court when the property in question is situate in Pretoria.

[39] The short answer to this issue is that the Gauteng Local Division, sitting in Johannesburg, enjoys concurrent jurisdiction with the

[45] CaseLines 24-10 to 24-14, par 5

Gauteng Division, sitting in Pretoria. An adequate explanation for this appears in the ***Isibonelo*** decision. [46] Jurisdiction is a point that should have been raised pertinently at the outset and not in an application for leave to appeal for the first time. Even if this court did not have jurisdiction, consent to this court's jurisdiction is implicit in the conduct of the trust and Mr Ngutshane in filing papers without raising their dispute to the court's jurisdiction.

[40] There is accordingly, no merit in this ground for leave to appeal either. In the result, I am of the view that there is no reasonable prospect that another court might come to a different finding to that to which I came in the main application. I am not, therefore, minded to grant leave to appeal, since I am not of the opinion that (i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. [47]

[41] On the question of costs, it was submitted by Ms Halgryn that this application for leave to appeal was, at its heart, that of the trust and not really of Mr Ngutshane, since none of the provisions of my order in my

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[46] ***Isibonelo Property Services (Pty) Ltd v Uchemek World Cargo Link Freight CC and Others*** (55408/2021) [2023] ZAGPJHC156 (17 February 2023), par 7-12

[47] See s 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013

prior judgment were against Mr Ngutshane. In that case, she submitted that, for reasons discussed in paragraph 47 of my prior judgment, [48] the trust should pay the costs of this application on the attorney and client scale, if it is unsuccessful in this application. In these submissions, she seems correct and I can see no reason in this application for departing from the scale of costs that I ordered applicable in the main application.

[42] In the result, I make the following order:

[42.1] the application for condonation brought by the first respondent, the Khayelihle Trust, and the second respondent, Mr Dalingcebo Emmanuel Ngutshane, is hereby granted;

[42.2] the application for leave to appeal brought by the Khayelihle Trust and Mr Ngutshane is hereby dismissed; and

[42.3] the costs of the application for condonation and the costs of the application for leave to appeal shall be paid by the Khayelihle Trust on the scale as between attorney and client.

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[48] CaseLines 00-20, par 47

ANTHONY BISHOP
Acting Judge of the High Court
Johannesburg

Date of hearing:	24 November 2023
Date of judgment:	27 November 2023
Attorneys for the applicants:	PME Attorneys
Counsel for the applicants:	Ms Tessa Halgryn
The respondents:	Mr Dalingcebo Emmanuel Ngutshane appeared on behalf of the trust and in person