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**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: 28 JUNE 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

BISHOP AJ:

[1] The first and second applicants, Nqaba Guarantee SPV (Pty) Ltd (*Nqaba*) and Eskom Finance Company SOC Ltd (*EFC*), seek judgment for R1 409 506,76, interest thereupon at 13,25% from 1 October 2017 to date of payment and their

costs, on the attorney and client scale, from the first and second respondents, the Khanyile Trust (*the trust*) and Mr Dalingcebo Emmanuel Ngutshane.

[2] In addition hereto, they seek an order declaring the trust's immovable property, portion 18 of erf 9[...] R[...] extension 5[...] township, registration division J.R., the province of Gauteng, measuring 378m² and situated at 1[...] W[...] Lane, M[...] Street, R[...] extension 5[...] (*the property*), declared specially executable; along with an order authorising the registrar to issue a warrant for the attachment of the property.

[3] The trust is the registered owner of the property. On 24 August 2011, EFC and the trust entered into a written loan agreement, in terms whereof the trust borrowed R1 287 830,00 from EFC. The loan was subject to certain suspensive conditions, namely, that:

[3.1] Nqaba had to issue a guarantee in favour of EFC for any amounts not paid by the trust to EFC in terms of the loan;

[3.2] the trust had to give an indemnity to Nqaba against any claims made by EFC against Nqaba under the guarantee in respect of the loan and a power of attorney had to be given for the passing of the mortgage bond referred to below;

[3.3] a mortgage bond for R1 800 000,00 had to be registered over the property in favour of Nqaba as security for any indebtedness of the trust to it arising out of the aforesaid indemnity; and

[3.4] the property had to be insured for its full value.

[4] The trust gave an indemnity to Nqaba on 24 August 2011; a power of attorney to register a mortgage bond was given on 24 August 2011; and a mortgage bond ¹ for R1 800 000,00 was registered over the property on 20 February 2012. ²

¹ The mortgage bond is styled as an "indemnity bond".

[5] No guarantee by Nqaba has been attached to the founding papers. In the founding affidavit, however, Nqaba and EFC are defined as “the lender” and it is alleged that the lender has complied with its obligations in terms of the loan. I am prepared to interpret that to mean that Nqaba provided EFC with the guarantee. I am prepared to do so, since the deponent to the founding affidavit, Mr Thabi Zondo, deposed that he is the legal officer ³ of both Nqaba and EFC and he has signed, as litigation manager, a certificate of balance. ⁴ On a balance of probabilities, it would seem to me more likely than not that this condition has been met.

[6] There is no proof that the trust insured the property. Again, the fact that Mr Zondo was prepared, as a legal manager, to sign a certificate of indebtedness, which I must accept at face value to be accurate and true, indicates to me that the probabilities favour the conclusion that the trust had insured the property.

[7] I conclude, therefore, that the loan came into force and effect. This conclusion is fortified by the contents of the statements of the loan account, ⁵ which clearly indicate that repayments towards the loan account were, up until a point, regularly made. Had there been no loan, no loan repayments would likely have been made: hence my conclusion that the loan came into force and effect.

[8] The scheme of funding and the security provided for the loan, in this matter, is more involved than a lender obtaining security in the form of a mortgage bond from the borrower. Here, EFC loaned moneys to the trust; if the trust defaulted on the loan, EFC could rely upon the guarantee given to it by Nqaba and call for payment from Nqaba of any outstanding moneys in terms of the loan; ⁶ provided Nqaba had paid EFC under the guarantee, it could claim the payment of those moneys from the

² The copy of the mortgage bond attached to the founding papers is incomplete, in that it is missing its second page. Nothing seems to turn on this. The founding affidavit has provided the missing evidence, which, although documentary hearsay, I am prepared to admit.

³ I interpret the phrase “legal officer” to be a position of management.

⁴ The certificate of balance is styled as a “certificate: proof of debt”.

⁵ Although the statements are addressed to Mr Ngutshane, not the trust, which took the loan, this is understandable since it was Mr Ngutshane’s employment with Eskom that qualified him for the loan, albeit that it was taken up through the vehicle of the trust.

⁶ I infer that the guarantee operates along common law principles, since it has not been provided.

trust, by virtue of the indemnity; and, if the trust failed to make payment to Nqaba of the amount demanded from it, Nqaba could look to the mortgage bond as security for payment by the trust.

[9] The way that Nqaba and EFC chose to address this in the founding affidavit was to refer to themselves by the single moniker of “the lender” and to assert that the lender had complied with its obligations in terms of the agreements and the mortgage bond. This sweeping statement is not particularly satisfactory and the failure by them to address the pertinent facts directly, rather than obliquely as they have done, has brought them within perilous proximity of failing to secure the orders they seek. Both their first and second supplementary affidavits did little to ameliorate this criticism. There was sufficient primary and secondary evidence, in my view, however, to establish a *prima facie* case on the founding papers for the orders sought.

[10] The trust and Mr Ngutshane chose other bases, than those I have just referred to, to challenge liability. Mr Ngutshane admits that he was an employee of Eskom until April 2016, when he left its employ to take up other opportunities. In preparation for doing so, he ensured that the trust had sufficient funds to cover the loan instalments for the following eight months, by which time he foresaw that his new business venture would be able to afford the loan repayments.

[11] He 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 EFC makes reference to its rules, which afforded the trust 90 days, from date of Mr Ngutshane’s termination, to transfer the loan and mortgage bond to another financial institution; as well as including an invitation to make arrangements with EFC. These terms seem more benevolent to me than those of the loan agreement and seem to have operated to the trust’s benefit.

[12] Although Mr Ngutshane complained that the instalment due, after his termination of employment with Eskom, was unexplained and exorbitant, he does not allege that the interest charged by EFC was usurious or illegal. The practical result was that the funds in the trust for the payment of loan instalments ran out sooner than Mr Ngutshane anticipated, which meant that the repayments for November and December 2016 were not made.

[13] After this happened, he says that he approached a debt counsellor on 20 January 2017. The referral to the debt counsellor was in respect of Mr Ngutshane's personal estate; not that of the trust. He has attached documents emanating from debt counsellors, including a debt restructuring proposal, as well as an email dated 26 January 2017 addressed by the debt counsellor to [s\[...\]@eskom.co.za](mailto:s[...]@eskom.co.za). Mr Zondo has deposed that such an email and, by extension, a person associated with that email is unknown to Ngaba or EFC.

[14] Mr Ngutshane has also produced an application dated 6 March 2017 in the Pretoria magistrates court, where he is described as the "consumer", and in terms whereof a restructuring of his financial obligations, owing to his over-indebtedness, was sought in terms of the provisions of the National Credit Act 34 of 2005.

[15] Then there is the debt counsellor's email of 15 May 2017 addressed to [s\[...\]@eskom.co.za](mailto:s[...]@eskom.co.za) (again) and [m\[...\]@eskom.co.za](mailto:m[...]@eskom.co.za), which elicited a response from Ms Ruwaida Chetty ([C\[...\]@eskom.co.za](mailto:C[...]@eskom.co.za)) calling for a copy of Mr Ngutshane's pay slip.

[16] On 12 July 2017, there was another debt review notice, this time from different debt counsellors, which was sent to [e\[...\]@eskom.co.za](mailto:e[...]@eskom.co.za), along with a debt restructuring proposal. And a payment was made to EFC of R100 000,00 on 16 June 2017 in accordance with this proposal. On 1 March 2018, the Pretoria magistrates court issued another application for the restructuring of Mr Ngutshane's indebtedness in terms of the National Credit Act.

[17] This application resulted in an order being granted on 7 August 2018, in terms whereof Mr Ngutshane was declared over-indebted and his debt obligations were

restructured, with EFC being entitled to be paid R9 720,00 per month for 251 months to settle the indebtedness to it.

[18] From what has been set out above, the glaringly obvious should be clear: the indebtedness to EFC was that of the trust, not of Mr Ngutshane. The latter debt restructuring application said precious little of the debt, except to imply that it was owed by Mr Ngutshane, which in truth could not have been so. It is not even clear whether he provided the loan agreement, the indemnification and mortgage bond to any of the debt counsellors, who assisted him; but, what is clear, is that neither set of debt counsellors appreciated that the debt was that of the trust and not of Mr Ngutshane.

[19] This begs the question: what is the effect in law of such an order? At best, it might prevent the granting of a judgment against Mr Ngutshane; but it cannot act as a contraceptive to the granting of an order against the trust.

[20] In-between these goings on, the registrar issued this application on 6 December 2017,⁷ and had it set down on 14 February, 18 April and 12 December 2018 and again on 27 February 2019, before being set down for hearing before me.

[21] Mr Ngutshane's view, expressed both in his answering papers and in his capable argument to me, was that Nqaba and EFC were ignoring the debt restructuring order of the Pretoria magistrates court. In this, he seems correct. The stance of Nqaba and EFC both in their replying papers and in their argument to me, ably put by *Ms Halgryn*, was that no debt review proceedings had been served upon Nqaba or EFC and, perhaps more definitively, when the second debt restructuring application was launched on 12 July 2017, debt enforcement steps had already been taken by Nqaba and EFC on 3 May 2017, when their first application was launched.⁸ This prevented, so the argument developed, debt review proceedings from being commenced legitimately.

⁷ This application had been preceded by a similar one against the trust only, which had been withdrawn on 10 April 2019.

⁸ This is the application that was subsequently withdrawn on 19 April 2019.

[22] I find this stance unconvincing. To rely upon the institution of earlier legal proceedings, which Nqaba and EFC elected to withdraw, is to rely upon a phantom. In my view, once those proceedings were withdrawn, their use as a “defence” to the debt restructuring proceedings fell away. Had the earlier legal proceedings resulted in an order, I would likely have thought differently of their efficacy. I cannot accede to Ms Halgryn’s line of reasoning on this point. Where Ms Halgryn’s argument does find traction with me is in respect of this application, which was launched on 1 December 2017. It constitutes steps contemplated in s 130 of the National Credit Act to enforce the loan agreement. As such, it operated as a legal bar in terms of s 86(2) to debt review proceedings. But, that bar did not render the order of the Pretoria magistrates court of 7 August 2018 a nullity that could be disregarded, even if it was granted contrary to the provisions of s 86(2).

[23] As against Mr Ngustshane, in my view, the restructuring order was good. I hold this view because of what was held in ***Tasima***:⁹

[178] The applicants have accepted this standpoint. In its counter-application, the Department stated explicitly that it ‘accept[s] that the respondents must always comply with a court order until it is set aside’. They contended further that ‘the previous contempt of court orders were all complied with’. Consequently, in their view, none of the orders made before the proceedings brought by Tasima in front of Hughes J ‘have a bearing on the current application’. The Corporation took a similar view. They stated unequivocally that, ‘not only does [the Corporation’s] conduct not constitute contempt but at no stage have we had any intention to commit such contempt’. Neither party claimed that the various orders outlined above can be ignored with impunity, even if the counter-application were to succeed.

[179] That position is also supported by our law. The unique role occupied by the judiciary since the dawn of our democracy is entrenched in s 165(1) of the Constitution. In addition, s 165(5) states:

⁹ ***Department of Transport and Others v Tasima (Pty) Ltd*** 2017 (2) SA 622 (CC), par 178-180

‘An order or decision issued by a court binds all persons to whom and organs of state to which it applies.’

However, s 2 of the Constitution also makes vivid the venerability of the Constitution:

‘This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’

[180] The equipoise is tipped by s 172(2)(a), which states:

‘The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, *but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.*’ [Emphasis added.]

This section culls an exception that implies the general rule. Only an order of constitutional invalidity requires confirmation by the Constitutional Court to take force. The general rule is that orders that *do not* concern constitutional invalidity *do* have force from the moment they are issued. And in light of s 165(5) of the Constitution, the order is binding, irrespective of whether or not it is valid, until set aside.

[24] During argument a debate ensued about whether the restructuring order would hold good only for so long as complied with by Mr Ngutshane, and what the result would be if he failed to comply with it: did it cease to be of force or effect, or would it have to be enforced by way of contempt proceedings, if he failed to comply with its terms? This debate was sparked by the wording of s 130(4)(e) of the National Credit Act. Because of the view I hold in this matter, this question need not be resolved by me; although I am inclined to think, on the wording of s 130(4)(e), that a failure to comply strictly with a debt review order of the magistrates court would relieve a court, seized with s 130 proceedings, of the obligation to dismiss the matter.

[25] The fact that Nqaba and EFC received no proper notice of the debt restructuring process, including the applications made to the magistrates courts, only provides further grounds to seek the rescission of the order ultimately made by the Pretoria magistrates court on 7 August 2018.

[26] In this matter, as alluded to paragraph 18 above, the answer lies in the fact that the debt restructuring order was never sought in respect of the trust's indebtedness; nor could it have been.¹⁰ The views I have expressed, in-between paragraph 18 and this paragraph, are *obiter dicta*.

[27] There has thus never been a debt restructuring order in respect of the trust. The order pertaining to Mr Ngutshane cannot, in my view, act as an impediment to the granting of an order against the trust.

[28] As for the indebtedness of the trust, the most recent statements of account and the most recent certificate of balance demonstrate that, despite making sporadic payments in settlement of the loan account balance, there is a significant amount still owing, well in excess of what is sought in the notice of motion.

[29] The sad truth of the matter is that the trust does not have the money to pay or, if it does have it, it has not paid it. It is indebted to Nqaba in at least the amount claimed in the notice of motion.

[30] The question then arises: when contemplating an order for special executability against a trust, must there be compliance with uniform rule 46 as well as rule 46A; or just with rule 46? Ms Halgryn referred to the decision of Lappan AJ in ***Investec***,¹¹ doubtlessly because it concerned the granting of a special executability order against immovable property owned by a trust. The conclusion reached in ***Investec*** was that rule 46A was not applicable.¹²

¹⁰ See s 18(1) of the National Credit Act, as read with the definition of "juristic person" in s 1 thereof.

¹¹ ***Investec Bank Ltd v Fraser NO and Others*** 2020 (6) SA 211 (GJ)

¹² ***Investec***, par 73

[31] The essential facts in that case, as I see them, were that the trust had stood surety¹³ in respect of a loan taken by a third party.¹⁴ When that third party failed to honour its obligations in terms of the loan agreement,¹⁵ Investec called up the loan.¹⁶ It sought repayment of the indebtedness by way of execution against various other persons;¹⁷ but ultimately relied upon the trust's suretyship liability to seek an order for special executability.¹⁸ Significantly, the trust had acquired an immovable property and at least one of the trustees and her children lived on it.¹⁹ It had been acquired at significant cost and renovated at a similar cost.²⁰

[32] The order for special executability was resisted on the basis that because one of the trustees and her children resided on the immovable property of the trust, which was their primary residence, rule 46A was of application in determining whether a special executability order should be granted. In reaching its conclusion, the court in **Investec** considered the decision in **Nedbank¹**²¹ and concluded that it was clearly wrong, because it went against the position established by authorities binding upon it.²² In preparing this judgment, I have recently learned that the **Nedbank¹** decision was taken on appeal in **Nedbank²**,²³ where the full bench dismissed the appeal²⁴ but directed that the matter was to be remitted to the court *a quo* for purposes of conducting an enquiry in terms of rule 46A.

[33] Also while preparing this judgment, I learned of the very recently reported decision in **Bestbier**.²⁵ This judgment had been handed down approximately a year earlier (on 13 June 2022) than it was reported in the South African Law Reports,

¹³ **Investec**, par 6

¹⁴ **Investec**, par 8-9

¹⁵ **Investec**, par 12

¹⁶ **Investec**, par 13

¹⁷ **Investec**, par 14-22

¹⁸ **Investec**, par 23

¹⁹ **Investec**, par 2.1

²⁰ **Investec**, par 11

²¹ **Nedbank v Trustees, Mthuzi Mdwaba Faimly Trust** 2019 JDR 1398 (GP)

²² **Investec**, par 73

²³ **Nedbank v Trustees, Mthuzi Mdwaba Faimly Trust** (A162/2021) [2023] ZAGPPHC 93 (16 February 2023)

²⁴ The application had been dismissed in **Nedbank¹** for want of compliance with rule 46A.

²⁵ **Bestbier and Others NNO v Nedbank Ltd** 2023 (4) SA 25 (SCA)

which is where I located it. It was known to the court in **Nedbank**²⁶, who referred to it in its judgment. ²⁶

[34] Despite the conclusion reached in **Investec** that rule 46A was not of application, because the immovable property in respect of which a special executability order was sought was trust property, the court there held that:

[70] *Where the shareholder or trustee is not the beneficial owner of the property*, no enquiry can be made into his/her personal circumstances when considering execution of a judgment debt obtained against a company or a trust of which they are a shareholder or trustee, respectively. In those circumstances, insisting on compliance with the provisions of rule 46A will be wholly misplaced as it would be aimed at protecting a right which the occupant of the property does not have as he/she is not the judgment debtor.
[own emphasis]

[35] On the facts before that court, I would have thought that the emphasised phrase in the quotation above had not been triggered, so as to prevent rule 46A from being invoked; and that, despite the immovable property being owned by a trust, that court was obliged to engage in an enquiry in terms of rule 46A, precisely because the trustee was the beneficial owner of the immovable property. I confess that I read this passage several times because I thought that it was (on the facts before that court) at odds with the conclusion that it reached. To me it seemed that the term “beneficial owner” of the property must surely be taken to mean the person(-s) associated with the registered owner, who by virtue of that connection *de facto* enjoy the benefits of the property; thus a “beneficial owner” is notionally something different to a nominal or registered owner in the context of rule 46A.

[36] In **National Urban**, ²⁷ Maier-Frawley J was saddled with a similar dilemma to that which I have faced: on the one hand, she regarded herself as bound by the **Investec** decision, because she was unable to find that the **Investec** decision was

²⁶ Nedbank2, par 6-9

²⁷ **National Urban Reconstruction & Housing Agency NPC v Morula Resources CC** 2020 JDR 2473 (GJ)

clearly wrong apropos the application of rule 46A;²⁸ and, on the other hand, she instinctively knew that a special executability order might well impact upon those in occupation of the property.²⁹ Faced with this conundrum, an inquiry in terms of rule 46A was undertaken on the strength of the principles laid down in judgments such as **Jaftha**,³⁰ **Saunderson**,³¹ and **Gundwana**.³² Effectively, the **National Union** decision was precognitive of the **Bestbier** decision.

[37] My concern with the decision in **Investec** was alleviated when I discovered the **Bestbier** decision. There, it was held:³³

[25] The text of rule 46A(1) reveals that the rule applies whenever an execution creditor seeks to execute against residential immovable property of a judgment debtor. Notably, rule 46A(2) provides that a court considering an application in which a creditor seeks to execute against the judgment debtor's immovable property must consider various matters. Given that rule 46A(2) provides that a court 'shall not' authorise execution unless 'all relevant factors' have been considered, I can see no reason why the fact, that the relevant immovable property is owned by a trust and occupied as a place of residence by the beneficiaries of that trust, should not be one of the factors to be taken into account. It is also noteworthy that rule 46A(3) requires that 'every notice of application to declare residential immovable property executable shall be . . . on notice to the judgment debtor *and to any other party who may be affected by the sale in execution . . .*'. (Own emphasis.)

[26] It is clear from a plain reading of the entire text of rule 46A that it is important to have a preceding enquiry in all cases where the immovable property of the judgment debtor is used as residential immovable property. This preceding enquiry should be directed at establishing whether the persons occupying the immovable property in question are of the **Jaftha** kind. As I see it, a creditor seeking to execute against immovable property owned by a trust

²⁸ **National Urban**, par 24

²⁹ **National Urban**, par 27

³⁰ **Jaftha v Schoeman and Others; van Rooyen v Stoltz and Others** 2005 (2) SA 140 (CC)

³¹ **Standard Bank of South Africa v Saunderson and Others** 2006 (2) SA 264 (SCA)

³² **Gundwana v Steko Development** CC 2011 (3) SA 608 (CC)

³³ **Bestbier**, par 25-27

would have to establish whether beneficiaries of that trust occupy the immovable property in question. Where that has been established, rule 46A would have to be followed and, consequently, rule 33 of the Practice Directive would have to be complied with. I therefore disagree with the submission made by the respondent's counsel that the person to be protected by rule 46A is, in the tradition of **Jaftha** and **Gundwana**, a natural person and not a legal persona such as a company or a close corporation, nor an institution such as a trust, 'even if the immovable property is the shareholder's, member's or beneficiary's only residence'. Clearly, a blanket approach that considers all immovable property held in the name of a juristic person to fall outside the protection of rule 46A is too narrow.

[27] Due regard must be had to the impact that the sale in execution is likely to have on vulnerable and poor beneficiaries who are occupying the immovable property owned by the judgment debtor, who are at risk of losing their only homes. Given the clear provisions of rule 46A, I can see no reason why trust beneficiaries who fall into the **Jaftha** kind category and occupy the trust's immovable property as a primary residence (and are thus likely to be affected by the order declaring the immovable property specially executable) should be barred from the protection of rule 46A merely because the property in question is owned by a trust.

[38] This interpretation obliges the application of rule 46A, whenever execution is sought against residential property, and allows no scope for the trigger to avoid a rule 46A inquiry, which was identified in **Investec** and which caused me concern over the correctness of the finding by that court. The position is, however, now clear. The mere fact that a property is owned by a trust (and I would venture, again *obiter*, that the same would apply to other persons, such as companies and close corporations) is not in and of itself a bar to the application of rule 46A. In every application where an order for special executability is sought against residential immovable property, the court must commence with a fact specific enquiry to determine if the property serves as the residence for any of the beneficiaries of the trust. This is but one of the factors to be considered in terms of the rubric 'all relevant factors', appearing in rule 46A(2). Rule 46A(3) requires notice to be given

to any party who may be affected by the execution order sought; which would include beneficiaries of a trust, who are in occupation of the immovable property.

[39] Mr Ngutshane described himself in his answering papers as both a trustee and beneficiary of the trust. Both assertions are logically sound, since it was by virtue of his erstwhile employment with Eskom that he qualified for finance through EFC to purchase the property, which would serve as his home.

[40] Mr Zondo, on behalf of Nqaba and EFC, said in the founding affidavit that as far as he knew the property was the primary residence of Mr Ngutshane and it was specifically purchased for residential purposes. Mr Ngutshane did not controvert this.

[41] I am bound, therefore, to apply the provisions of rule 46A in considering whether to grant the orders sought pertaining to executability.

[42] Nqaba and EFC have placed updated figures before me, which demonstrate that the trust's indebtedness far exceeds what was sought in the notice of motion. There is no indication from the payment history that the trust has the means to settle the arrears, much less the full indebtedness. NPGS ³⁴ placed an *onus* on the trust and, I would add, Mr Ngutshane as a beneficiary of the trust who resides on the property, to place his personal circumstances before the court, in order to assist it with its rule 46A inquiry.

[43] Besides establishing that he has left the employ of Eskom to take up other opportunities and that he has referred his personal over-indebtedness to the Pretoria magistrates court, where he obtained a debt restructuring order, his lengthy answering affidavit does not provide much assistance. What is clear from comparing the terms of the debt restructuring order to the loan statements is that the payments ordered by the Pretoria magistrates court were not made in the amounts so ordered nor with regularity. The payments were erratic and stopped in July 2020.

³⁴ ***NPGS Protection and Security Services CC and Another v FirstRand Bank Ltd*** 2020 (2) SA 494 (SCA), par 53 and 55

[44] I cannot see any way forward for the trust, or Nqaba and EFC, other than declaring the property specially executable. The rates and taxes owed on the property are constantly growing. The arrears are growing. There is no evidence that the trust has any other assets against which execution could occur. The prospects of the trust righting the position are bleaker now than when the application was launched. A special executability order must follow. In so doing, it is appropriate to set a reserve price at R1 000 000, which I regard on a conspectus of all of the facts before me as fair. Nqaba and EFC may, of course, at any stage approach this court for a variation of this amount in common law, if there are new facts or changed circumstances, which have come to its knowledge subsequent to this order.

[45] Notwithstanding the current state of affairs, the trust may yet (despite all indications) manage to settle the arrears, which they are entitled to do prior to a sale in execution.

[46] Lastly, before making my order, I should say that it is more probable than not to me that the indebtedness of the trust is owed to Nqaba, not EFC, by virtue of the operation of the elaborate contractual arrangements referred to in paragraph 8 above. There is no basis to hold Mr Ngutshane liable, jointly and severally, or otherwise, for the trust's debt.

[47] Costs are provided for on an attorney and own client scale in the mortgage bond. The prayers in the notice of motion seek costs on the attorney and client scale. I see no reason why I should not order costs on the attorney and client scale against the trust in the circumstances. This, however, is only in respect of Nqaba, which has proven to be substantially successful against the trust. No substantive order will be granted in EFC's favour and neither will it be entitled to any costs. No order will be granted against Mr Ngutshane. Having proven substantially successful in opposing any substantive relief being granted against him, he is entitled to his costs; whatever those may be, since he seems to have represented himself throughout this matter.

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

[48.1] the first respondent, the Khayelihle Trust, is forthwith to make payment to Nqaba Guarantee SPV (Pty) Ltd, the first applicant, of the amount of R1 409 506.76, together with interest thereupon at 13,25% per annum calculated daily and capitalised monthly, from 1 October 2017 to date of payment;

[48.2] the first respondent's immovable property, being portion 1[...] of erf 9[...] R[...] extension 5[...] township, registration division J.R., the province of Gauteng, measuring 378m² and situated at 1[...] W[...] Lane, M[...] Street, R[...] extension 5[...] (*the property*), is hereby declared specially executable for the aforesaid amount, interest thereupon and costs;

[48.3] the registrar is hereby authorised to issue a warrant of execution for the attachment and sale in execution of the property;

[48.4] there shall be a reserve price of R1 000 000 imposed as a condition at the sale in execution of the property;

[48.5] the first respondent is to pay the costs of the first applicant;

[48.6] Eskom Finance Company SOC Ltd, the second applicant, shall bear its own costs;

[48.7] the first and second applicants are to pay the costs of Mr Dalingcebo Emmanuel Ngutshane, the second respondent, jointly and severally, the one paying the other to be absolved;

[48.8] the trust may 'reinstate' or 'revive' the loan agreement and resume possession of the property, in terms of s 129(3), as read with s 129(4), of the National Credit Act 34 of 2005, by paying the first applicant all amounts that are overdue in terms of the loan agreement, together with 'default charges'

and the reasonable costs of enforcing the loan agreement and mortgage bond; and

[48.9] this order is to be served on the first and second respondents.

ANTHONY BISHOP
Acting Judge of the High Court
Johannesburg

This judgment will be uploaded onto CaseLines on 29 June 2023, which system will notify the parties' legal representatives of the change to the record in the course of the day. It will be deemed to have been handed down at 10h00 on 30 June 2023.

Date of hearing: 1 November 2022

Date of judgment: 29 June 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