IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Not Reportable

CASE NO. 218/2023

In the matter between:

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA — **Applicant**

and

KINROS ESTATES (PTY) LTD
(Registration number: 2018/261040/07) — **First respondent**

PIETER JOHANNES GERHARDUS MOOLMAN
(Identity number: 8[...]) — **Second respondent**

JUDGMENT

LAING J

[1] This is an unopposed application for leave to appeal against a portion of the judgment and the whole of the order handed down on 6 August 2024. The background

facts appear therefrom and will not be repeated, save to mention that the matter pertains to the appellant's attempt to enforce the terms and conditions of a loan agreement previously concluded with the first respondent for the purchase of immovable properties.

[2] The agreement was signed on 9 October 2018 at the appellant's provincial offices by its representative, Mr Zilindile Makapela. It was witnessed by a further representative, Mr Reynier Kapp. The court found that the conclusion of the agreement did not comply with the appellant's delegation of powers and was unauthorized. Consequently, it was deemed void and unenforceable.

[3] The appellant based its application for leave to appeal on a limited set of grounds. It argued that the court erred in finding that Mr Makapela, as a Class B signatory, was the only representative to have signed the agreement and that Mr Kapp merely signed as a witness. In that regard, the appellant contended that Mr Kapp, being a Class C signatory, was properly authorized and the fact that he signed in the space demarcated for a witness was irrelevant. The court should have found, based on the evidence, that the agreement fell within the ambit of section 26 of the Land and Agricultural Development Bank Act 15 of 2002, that the delegation of powers required the agreement to be signed by a Class B and a Class C signatory, that this is what took place, and that the agreement was valid and enforceable.

[4] The main issue for determination is whether the grounds mentioned by the appellant are persuasive enough to allow the court to grant the leave sought. The relevant principles are discussed, briefly, below.

[5] In terms of section 17(1)(a) of the Superior Courts Act 10 of 2013, leave to appeal may only be given where a judge is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard. The provisions in question were interpreted to mean, in *S v*

Smith,[1] that more is required to be established than the mere possibility of success, that the case is arguable on appeal, or that the case cannot be categorized as hopeless.[2] The inclusion of the words 'only' and 'would' has been held to have made the threshold for the granting of leave higher than what it was previously under the Supreme Court Act 59 of 1959. In *Pretoria Society of Advocates v Nthai*,[3] the court held that there must now be a measure of certainty that another court will differ from the court in relation to whose judgment leave to appeal is sought.[4]

[6] The crux of the application for leave pertains to the appellant's delegation of powers. In that regard, the appellant asserted that the loan agreement was not a 'loan and/or facility agreement within the borrowing limits agreement with any counterparty'.[5] It was unnecessary for the chief financial officer ('CFO') and a Class A signatory to have signed. The agreement was, instead, a document that fell into another category, i.e. a loan agreement concluded under section 26 of Act 15 of 2002.[6] It was necessary only for a Class B and a Class C signatory, alternatively two Class C signatories, to have signed.

[7] The appellant made an averment to that effect in its founding affidavit. The respondents raised the question of the validity of the loan agreement in their answering affidavit, contending that it lacked proper authorization no matter what category of document it comprised. The appellant did not, in reply, strongly refute the appellant's contentions, but merely argued that the fact that Mr Makapela had signed the agreement did not invalidate it or render it unenforceable; the principle of *pacta sunt servanda* should apply.

[8] The provisions of section 26 of Act 15 of 2002, read with section 3, seem to be wide enough to permit the appellant to assert that the loan agreement fell into the

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[1] 2012 (1) SACR 567 (SCA).
[2] At paragraph 7, with reference to *S v Mabena* 2007 (1) SACR 482 (SCA), at paragraph 22.
[3] 2020 (1) SA 267 (LP).
[4] At paragraph 5, with reference to *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC), at paragraph 6.
[5] The document is listed at item 3 of the appellant's delegation of powers.
[6] It was alleged to have fallen under item 15.

category alleged. Consequently, there appears to be a basis for the appellant to contend that the signatories in question were sufficient. This attracts, of course, the question of whether the fact that Mr Kapp signed in the space demarcated for a witness meant that he signed merely in that capacity and not as a signatory under the delegation of powers.

[9] In *AB and another v Pridwin Preparatory School and others (Equal Education as amicus curiae)*,[7] the Supreme Court of Appeal dealt with the right of a private school to terminate a contract with the parents of learners. Cachalia JA set out some of the most important principles arising from the case law regarding the relationship between private contracts and the control thereof by the courts through the instrument of public policy, underpinned by the Constitution. With reference to the decision in *Barkhuizen v Napier,*[8] the learned judge confirmed that public policy demands that contracts freely and consciously entered must be honoured. Cachalia JA went on to state:

> '…a court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds…'[9]

[10] The delegation of powers clearly intended senior officials of the appellant to exercise oversight regarding the conclusion of a loan agreement. Presumably this would be to minimize the appellant's risk. Both Mr Makapela and Mr Kapp were involved in the conclusion of the agreement in the present matter. There is no provision in the delegation of powers that expressly required the agreement to have been witnessed, and it is possible to contend that Mr Kapp's signature, wherever it was placed, met the

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[7] [2019] 1 All SA 1 (SCA).
[8] 2007 (5) SA 323 (CC), at paragraphs [57] and [87].
[9] *Pridwin*, at paragraph [27]. The learned judge referred to the decision in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A), at 9C- D.

stipulated oversight requirements. Based on the principles summarized in *Pridwin*,[10] it could indeed be argued that the agreement was properly authorized.

[11] Consequently, the court accepts that the appeal would have a reasonable prospect of success. If the amount at stake is considered, too,[11] as well as the respondents' technical defence in the face of its concession that the funds had been received but not repaid, then the court is of the view that the relief sought must be granted.

[12] The following order is made:

(a) leave to appeal to a full bench of the Eastern Cape Division is granted; and

(b) costs are those in the appeal.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Adv Van Schalwyk

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[10] In this division, Smith J (as he was then) cited the decision with approval in *Nelana v Interim Chairperson of the Board: Buffalo City Metropolitan Development Agency Board and others* (4027/2022) [2023] ZAECMKHC 25 (7 February 2023), at paragraph [19].

[11] The appellant alleged that the first respondent owed, on 31 August 2022, the sum of R 24,475,284.

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Date heard:	18 November 2024.
Date of delivery of judgment:	25 November 2024.