

REPUBLIC OF SOUTH AFRICA



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

Case Numbers: 2018/45883; 2019/40463; 2020/16341

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

24 October 2025

DATE

SIGNATURE

In the matter between:

In re: The rescission application:

DALIKHAYA RAIN ZIHLANGU N.O.

First Applicant

UNATHI MDODANO N.O.

Second Applicant

(1st and 2nd Applicants cited as trustees of the Eyabantu Development Trust)

and

LULAMA SMUTS NGONYAMA

First Respondent

NOKWAZI NOKWAZELELA NGONYAMA N.O.

Second Respondent

KHANYA MALUNGELO NGONYAMA N.O.

Third Respondent

QHAWA HLOMELO NGONYAMA N.O.

(2nd to 4th Respondents cited as trustees of the Khululekile Family Trust)

Fourth Respondent

THABO SINDISA KWINANA

Fifth Respondent

ZOLISILE MTETELELI MAPIPA

(5th and 6th respondents cited in their capacity as the previous trustees of the Eyabantu Development Trust)

Sixth Respondent

In re: Joinder and intervention application

EYABANTU CAPITAL CONSORTIUM (PTY) LTD

First Applicant/Intervenor

EYABANTU CAPITAL (PTY) LTD

Second Applicant/Intervenor

and

LULAMA SMUTS NGONYAMA

First Respondent

NOKWAZI NOKWAZELELA NGONYAMA N.O.

Second Respondent

KHANYA MALUNGELO NGONYAMA N.O.

Third Respondent

QHAWA HLOMELO NGONYAMA N.O.

Fourth Respondent

THABO SINDISA KWINANA

Fifth Respondent

THABO SINDISA KWINANA N.O.

Sixth Respondent

ZOLILE MTETELELI MAPIPA N.O.

Seventh Respondent

JUDGMENT

WINDELL J:

[1] Before this court there are two applications for leave to appeal arising from the judgment delivered on 6 May 2025. The first is brought by the Eyabantu Development

Trust, which seeks leave to appeal against the dismissal of its rescission application. The second application is brought by Eyabantu Capital Consortium (Pty) Ltd and Eyabantu Capital (Pty) Ltd (“the Capital parties”) seeking leave to appeal against the dismissal of their joinder and intervention application. Both sets of applicants also seek to challenge the orders granted in favour of the respondents, Mr Lulama Smuts Ngonyama and the Khululekile Family Trust (“the Ngonyama parties”).

[2] I do not propose to repeat the factual history or my detailed findings. Those are fully set out in the main judgment and are well known to the parties.

[3] It is trite that the applications must be considered against the requirements of s 17(1)(a) of the Superior Courts Act 10 of 2013. Leave may only be granted if there is a reasonable prospect that another court would come to a different conclusion, or if there is some other compelling reason for the appeal to be heard. The threshold is deliberately high.

The rescission application

[4] The first application for leave to appeal is brought by Mr Zihlangu and Ms Mdoda, the current trustees of the Eyabantu Development Trust (“the trust”). They seek to challenge this court’s dismissal of their rescission application of the default judgment and contends that there are ‘compelling reasons’ for leave to appeal to be granted because the dispute allegedly raises questions of public importance concerning the fiduciary duties of trustees, the ethical obligations of attorneys, and the proper exercise of judicial discretion in rescission matters. It further argues that the default judgment was irregularly obtained because:

(a) Mr Kwinana, one of the trustees of the trust, acted without the authority of his co-trustee, Mr Mapipa;

(b) the sale of shares contravened the pre-emptive provisions of the shareholders' agreement and lacked the necessary approvals from the mining houses involved in Project Pangolin; and,

(c) the trust was legally precluded from alienating its shares prior to the tenth anniversary of Project Pangolin.

[5] These points are neither new nor persuasive. They were all raised, considered, and rejected in the main judgment. Moreover, the default judgment was granted against the trust six years ago in 2019. It has since been the subject of multiple rescission and appeal proceedings before Grenfell AJ, the Supreme Court of Appeal, and the Constitutional Court—all of which refused to interfere with the default judgment. It is clear that the same factual and legal arguments are being recycled in successive proceedings under the guise of new trusteeship or 'triable issues'.

[6] The trust further relies on alleged procedural unfairness or the absence of joint-action authority. This argument is misconceived. A trust acts through its duly appointed trustees. The evidence showed that the trust, through its then trustee and attorney, Mr Kwinana, had participated in and acquiesced to the arrangement recognising Mr Ngonyama's beneficial ownership. The subsequent disavowal of that arrangement by a later-constituted group of trustees does not revive a matter already adjudicated.

[7] The trust's submissions regarding 'judicial discretion' and 'public importance' similarly lack substance. The issues raised are private, fact-bound, and long since resolved. No novel question of law or principle arises that would justify a further appeal. The matter is, in truth, academic: the default judgment remain extant, execution proceedings are pending, and every appellate forum has declined to interfere.

[8] Viewed objectively, the trust's latest application forms part of the same pattern of abuse of process identified in the main judgment. Each new application—whether framed as rescission, intervention, or now leave to appeal—has had the effect of delaying the enforcement of a final judgment and burdening both the respondents and the court system. As stated in *Beinash v Wixley*,¹ court processes may not be used for ulterior purposes. To continue entertaining repetitive litigation would erode finality and the integrity of the judicial process.

[9] In these circumstances, there is no reasonable prospect that another court would come to a different conclusion, nor any compelling reason for an appeal. The trust's reliance on fairness and 'triable issues' is a thinly disguised attempt to reopen a matter long settled.

[10] The application for leave to appeal by the Eyabantu Development Trust is therefore dismissed with costs, including the costs of two counsel where so employed.

¹ 1997 (3) SA 721 (SCA) para [28].

The joinder application

[11] Central to the Capital Parties' application for leave to appeal is this court's finding that South African law recognises oral trusts, that the Khululekile Family Trust had from the outset been the beneficial owner of a 6.5% shareholding in the Consortium, and that the default judgment 'did not effect a change of ownership; they clarified the true legal position'.

[12] In their heads of argument, the Capital Parties contend that the court erred in finding that an oral trust existed through which the Khululekile Family Trust held beneficial ownership of shares in Eyabantu Capital Consortium. They argue that the pleadings did not allege, nor did the evidence establish, any such oral arrangement. They further submit that recognising the Khululekile Family Trust's beneficial interest may have been contrary to the Companies Act, relying particularly on sections 94(1) and 140.

[13] These contentions cannot be considered in isolation from the broader pattern of litigation orchestrated under the direction of Mr Dalikhaya Rain Zihlangu. The present application by the Capital Parties forms part of that continuing course of conduct. Eyabantu Capital (Pty) Ltd serves as his private investment vehicle, while Eyabantu Capital Consortium (Pty) Ltd is the company of which he has been the chief executive officer since inception. The former holds shares in the latter, and together they are conveniently referred to as "the Companies".

[14] The distinction between the two entities is material. Eyabantu Capital (Pty) Ltd, the first company, is merely a shareholder in the Consortium. A shareholder has no right to litigate in respect of a wrong allegedly done to the company in which it holds shares. None

of the other shareholders have chosen to participate in this litigation. Only Mr Zihlangu's companies persist, under his direction, in seeking leave to appeal.

[15] The record reveals a sustained pattern of litigation directed and controlled by Mr Zihlangu across all related proceedings. He has been the driving force not only behind the present application by the Capital Parties (including the Consortium) but also behind the first application for leave to appeal brought in the name of the Eyabantu Development Trust. This pattern is evident in the conduct of the Consortium, which: (a) knew as early as 2019 of the judgments granted against the Trust; (b) in the same year became aware of the judgment against itself under section 161 of the Companies Act; (c) initially elected not to institute its own proceedings but to align itself with the outcome of the Trust's rescission application before Grenfell AJ; (d) reversed that position after the Trust's failure and brought its own rescission application; (e) sought leave to intervene in the Supreme Court of Appeal in support of the Trust's rescission appeal, and failed; (f) thereafter revived its own rescission application before Fischer J; (g) withdrew that application; (h) reinstituted it again in 2024; (i) expressly conceded that its prospects "stand or fall" with the success of its own rescission application; and (j) now seeks to appeal the refusal of that very application. That chronology underscores the continuity of Mr Zihlangu's litigation strategy and provides the context for assessing the present application.

[16] Against that background, the present application is simply the latest iteration of the same challenge pursued through different entities under Mr Zihlangu's direction. Despite this succession of proceedings, the Capital Parties' essential position remains unchanged. Their application for joinder was dismissed, and they accordingly lack standing to contest findings made in proceedings to which they were not parties. Having

been refused leave to intervene, they cannot now reopen or re-argue issues already decided by this court. Moreover, the Companies have not shown why another court would find that a company possesses a legally protected interest in its own shareholding. As this court held, the Consortium has no such right, and that principle is well established. On this basis alone, the application for leave to appeal must fail.

[17] Even if the Capital Parties' arguments were to be entertained, they remain without merit. The applicants accept that South African law recognises oral trusts under section 2 of the Trust Property Control Act 57 of 1988. Their complaint is not directed at that legal principle but at its factual application. They contend that there was no evidence establishing that the Khululekile Family Trust was created through an oral arrangement or that it held beneficial ownership of the 6.5 per cent shareholding in the Consortium. That contention is untenable. The evidence showed that the beneficial ownership of the shares was, from the outset, recognised as vesting in the Khululekile Family Trust, and that this arrangement was implemented and acquiesced in by those acting on behalf of the Consortium and the Eyabantu Development Trust, notably Mr Kwinana, in his representative capacities. His conduct and contemporaneous documentation confirmed that understanding. The later attempt by a differently constituted group of trustees to repudiate that arrangement does not revive an issue already adjudicated.

[18] This court's finding that a trust may validly arise from an oral agreement was firmly grounded in section 2 of the Trust Property Control Act, which requires no formal written instrument for the creation of a trust. The Court's reliance on *Groeschke v Trustee for the*

*Time Being of the Groeschke Family Trust*² was apposite. In that matter, as here, the Court recognised that an oral declaration of trust, supported by conduct and surrounding circumstances evidencing the intention to create a trust, suffices to establish its existence. The Capital Parties have not identified any legal error in that reasoning or demonstrated that another court would disregard the authority of *Groeschke* or depart from settled principles of trust law.

[19] There is accordingly no reasonable prospect that another court would reach a different conclusion, nor any compelling reason for an appeal to be heard. To grant leave would merely perpetuate repetitive litigation in a matter that has long since reached finality.

[20] In the result the following order is made:

1. The applications for leave to appeal are dismissed with costs on Scale C, including the costs of two counsel where so employed.



L WINDELL

Judge of the High Court,

Johannesburg

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

² 2013 (3) SA 254 (GSJ).

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 October 2025.

Appearances

For the applicants (the Capital Parties): R. Stockwell SC and J.F. Pretorius

Instructed by: Erasmus de Klerk Inc.

For the applicants (the Eyabantu Development Trust): L. Mnqandi

Instructed by: Madlanga & Partners Inc.

For the Respondents: L.J. Morison SC

M Salukazana

Instructed by: Knowles Husain Lindsay Inc

Date of Hearing: 9 September 2025

Date of Judgment: 24 October 2025