



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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Thabo Sindisa Kwinana and Others v Lulama Smuts Ngonyama and Others (Case no 103/2021) [2022] ZASCA 48

Today the Supreme Court of Appeal dismissed an appeal from the Gauteng Division of the High Court, Johannesburg (high court).

The appellants in this matter were Mr Thabo Sindisa Kwinana and the trustees of Eyabantu Development Trust (the Kwinana parties). They were the unsuccessful applicants in an application in the high court to rescind and set aside two default judgment previously granted in favour of the respondents, Mr Lulama Smuts Ngonyama and the trustees of the Khululekile Family Trust (the Ngonyama parties).

In 2005, the Ngonyama parties entered into an oral agreement with Mr Kwinana in terms of which the latter acted as agent and attorney for the Ngonyama parties in order to procure a 6.5% shareholding in Eyabantu Capital Consortium, the latter having been the agent and for the benefit of the Khululekile Trust. Another agreement was entered into in 2006 where it was held that Eyabantu Trust would transfer 50% of all income derived from its 13% shareholding in Eyabantu Capital Consortium to the Khululekile Trust. It was also alleged that the Kwinana parties owed the Ngonyama parties a duty to account for all income that had accrued pursuant to the 2006 agreement. The high court granted default judgment against the appellants to which the Kwinana parties launched a subsequent rescission application.

Eyabantu Consortium and Eyabantu Capital (Pty) Ltd filed an application to be joined in the appeal, as the latter was a significant shareholder of the former. This application was opposed by the Ngonyama parties. This Court, after having heard counsel for the parties, dismissed the application for intervention because this Court found that the intervening parties intended to obtain a rescission of the high court's orders at their own instance, without ever having applied for that relief. This would have required this Court assuming the role of a court of first instance.

The sole submission of the Kwinana parties before this Court was that the high court orders should have been set aside under Uniform rule 42(1)(a), on the basis that the particulars of claim did not disclose a cause of action against any of them. Mr Kwinana argued that the

particulars of claim did not disclose a legal basis upon which he could be ordered to account or to transfer the shares. The Eyabantu Trust contended that *ex facie* the registration number of the Khululekile Trust as reflected in the particulars of claim, had only been registered in 2007, after the 2005 and 2006 agreements had been entered into. However, none of this information had been raised in the rescission application. The Kwinana parties only sought to do so in their replying affidavit which the high court refused to admit as it was filed seven months out of time. This Court found that the Kwinana parties ignored a notice under Uniform rule 30 to have the replying affidavit set aside and also failed to apply for condonation for the late filing of the replying affidavit. Accordingly, this Court found no basis to have interfered with the discretion of the high court and indicated that it was impermissible to have raised the rule 42(1)(a) argument on appeal.

In the result, the SCA dismissed the appeal.

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