Banking, Finance & Projects

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SOUTH AFRICA

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BANKING, FINANCE & PROJECTS ALERT

Absence from meetings makes the heart grow fonder: The effect of *Shepstone and Wylie Attorneys v De Witt N.O. and Others* on trusts in finance transactions

Since 2013, the Penvaan Trust (Trust) has been navigating a convoluted judicial journey, with its trustees (Mr and Mrs V as well as Mr de Witt) inadvertently opening a can of legal worms in *Shepstone and Wylie Attorneys v De Witt N.O. and Others* (CCT 171/23) [2025] ZACC 14 (1 August 2025). The Penvaan group of companies (Penvaan Group), in which the Trust held shares, was being wound up and one of its creditors, Firstrand Bank Limited (FNB), sought to recover the money it had lent to the group by sequestrating the Trust.

Secondly, Mr and Mrs V were in the middle of divorce proceedings, and the Trust had signed a deed of suretyship for Mrs V's legal costs in favour of Shepstone and Wylie (the suretyship), the law firm representing her in the divorce proceedings.

Essentially Mrs V had given notice to the other two trustees for a meeting to consider whether the Trust would (i) oppose the sequestration and (ii) grant the suretyship.

Ultimately, Mr V did not attend the meeting and the remaining two trustees resolved that the Trust would (i) oppose the sequestration and (ii) stand as surety for Mrs V's legal costs arising from the divorce proceedings. Following this, the issue contested from the High Court through to the Constitutional Court was whether the suretyship was binding on the Trust given that, even though the meeting was quorate and all three trustees (including Mr V) received notice of the meeting, the resolution was passed in the absence of one trustee.

The Supreme Court of Appeal (SCA) dismissed Shepstone and Wylie's appeal, saying that the Trust could not be held liable as the suretyship was not properly authorised on the basis that only two out of three trustees had approved the decision to grant the suretyship. It held that trustees, when dealing with trust property, are always required to act jointly – even when the trust deed provides for majority decisions – and that all resolutions must be signed by all trustees in order to be legally effective.

This issue was then taken all the way to the Constitutional Court, which ultimately criticised the SCA's restrictive view that all external decisions binding third parties require unanimous approval and emphasised that the validity of a trust's contract or decision depends on the requirements of the trust deed. In other words, although common law requires trustees to act jointly in order to bind a trust, to the extent that a trust deed allows for majority decisions, then any decisions taken on that basis are legally valid and binding – provided of course that all quorum and notice requirements are met.

Following a proper reading of the Penvaan trust deed, the Constitutional Court established that only majority support was required and, accordingly, the absence of one trustee did not invalidate the resolution. The suretyship was therefore valid and binding on the Trust.

Absence from meetings makes the heart grow fonder: The effect of *Shepstone and Wylie Attorneys v De Witt N.O. and Others* on trusts in finance transactions

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Key takeaways

Although subtle, the judgment carries commercial implications, with trusts frequently appearing as borrowers, guarantors or security providers in corporate financing transactions. Banks naturally rely on trusts to validly authorise their entry into the agreements to which they are a party as part of the transaction and the Penvaan saga underscores the importance for lenders of reviewing the trust deed to determine the level of support (i.e. majority versus unanimous) that is required for certain decisions to be made – similar to how, in the context of companies, one would review the company's memorandum of incorporation to ensure that it has the necessary capacity and authority to enter into the agreements to which it is a party.

The root of this dispute arguably lies in the ambiguous wording of the trust deed regarding decision-making. The key lesson for trusts is accordingly to ensure that these requirements are clear, leaving minimal room for interpretation, particularly in relation to the level of support that is required from trustees in order for the trust's decisions to be properly authorised.

While the default common law position requires trustees to act jointly to bind a trust, the Penvaan Trust's protracted journey through the courts highlights two lessons to bear in mind as part of the goal to mitigate risk and avoid potential disputes involving trusts.

Firstly, founders of trusts should ensure that the requirements regarding majority or unanimous approval are clearly stipulated when preparing the trust deed in order to avoid the risk of decisions being challenged by creditors down the line.

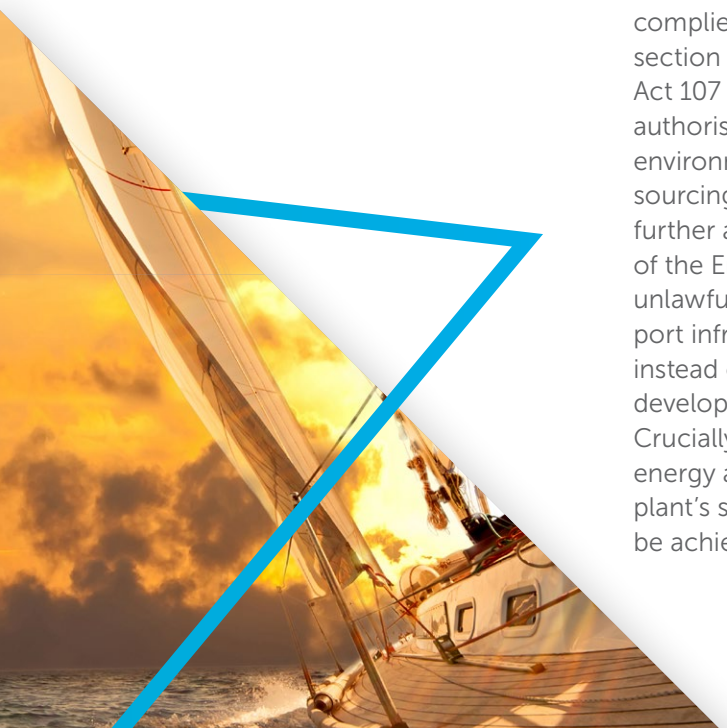
Secondly, for banks or other creditors concluding corporate transactions with trusts, this judgment is a reminder of the principle that there is no *"one size fits all"* when it comes to trusts. Parties must always fall back on the trust deed and its decision-making requirements to ensure that resolutions are properly adopted and the agreements they approve are duly authorised. If the trust deed expressly allows for majority support from the trustees to bind the trust to certain agreements or assume certain obligations, then a majority level of support from the trustees will suffice, despite the common law position which requires trustees to act jointly (assuming of course that all quorum and notice provisions are followed). If the trust deed is ambiguous on this issue, it would be wise for banks providing the funding/creditors to adopt a more conservative approach and require that the resolution of the trust takes the form of a written resolution (as opposed to minutes of a meeting) whereby all the trustees sign and approve the resolution to ensure that the decision is validly authorised and the agreements which the trust enters into as part of the transaction are legally binding.

Kobus Smith and Evangelia Goulas

BANKING, FINANCE & PROJECTS ALERT

Supreme Court of Appeal ruling redefines permitting standards for energy

In the recent decision in *South Durban Community Environmental Alliance and Another v The Minister of Forestry, Fisheries and the Environment (479/2023) [2025] ZASCA 134*, the Supreme Court of Appeal (SCA) set aside the environmental authorisation for Eskom's proposed 3000 MW combined cycle gas power plant in Richards Bay. The ruling will likely reshape how large-scale energy and infrastructure projects are permitted in South Africa. The SCA has clarified and re-affirmed that permitting cannot be segmented, deferred or treated as a policy formality.



The main dispute concerned whether the authorisation complied with the decision-making criteria outlined in section 24O of the National Environmental Management Act 107 of 1998 (NEMA). The appellants argued that the authorising authorities failed to assess the cumulative environmental impact of the project, including fuel-sourcing emissions and lifecycle carbon impact. They further argued that the authorities, in their consideration of the Environmental Impact Assessment (EIA), unlawfully deferred consideration of the gas pipeline, port infrastructure and related facilities to later stages, instead of treating these as part of the cumulative development footprint to be assessed in the EIA. Crucially, the appellants demonstrated that no renewable energy alternatives had been considered, despite the plant's stated objective being grid stability, which would be achievable through other energy solutions.

Key legal developments

The judgment reinforces NEMA's centrality as the overarching framework for interpreting and implementing environmental laws across all government spheres. Critically, it confirms that environmental authorisation decisions under section 24O(1)(b) of NEMA must include a thorough assessment of climate change impacts associated with all the proposed activities.

The court also established that authorities must evaluate cumulative environmental impacts, considering past, present and reasonably foreseeable future effects. Second, the need and desirability of proposed activities must be substantively justified, and third, the feasible and reasonable alternatives must be considered, with particular emphasis on renewable energy options.

Regarding procedural requirements, the SCA further held that public participation must be conducted through culturally appropriate methods, including use of local languages where necessary. The court found that conducting consultations exclusively in English in an area where 79% of residents speak isiZulu constituted procedurally inadequate participation, rendering the authorisation reviewable.

Supreme Court of Appeal ruling redefines permitting standards for energy

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Implications for projects

Environmental authorisations that do not comply with NEMA's substantive and procedural requirements are now clearly vulnerable to judicial review and potential invalidation. Projects that form part of broader developments must assess the environmental impacts of all related activities, not just isolated components. For engineering contractors, independent power producers, project sponsors and permitting consultants, the implications are significant. Projects with multiple development components such as gas-to-power facilities, liquified natural gas terminals, transmission corridors and fuel supply pipelines must be assessed as integrated systems. Upfront studies must now align technology choice with climate impact credibility. Authorities will no longer accept deferrals or broad policy references as substitutes for actual evidence of compliance. Moreover, the failure to adequately consider renewable energy alternatives may render environmental authorisations legally indefensible and open to challenge. Project finance practitioners must ensure that environmental due diligence processes are comprehensive and aligned with the judgment's requirements.

This judgment will likely delay poorly prepared project assessments, but may accelerate those that incorporate sustainability into their core project assumptions. Primarily, the delay in obtaining environmental authorisations would result from the raised standards for the requirement for cumulative environmental impact assessments of all project activities.

Practical recommendations

For project participants, it is advisable to require independent legal opinions confirming that environmental authorisations comply with the full NEMA framework, including specific verification of climate change impact assessments and renewable energy evaluations. Participants should also include detailed environmental compliance representations and warranties that cover both procedural and substantive aspects, particularly public participation requirements. Additionally, enhanced monitoring procedures should be implemented to track regulatory developments affecting renewable energy alternatives that could impact project viability.

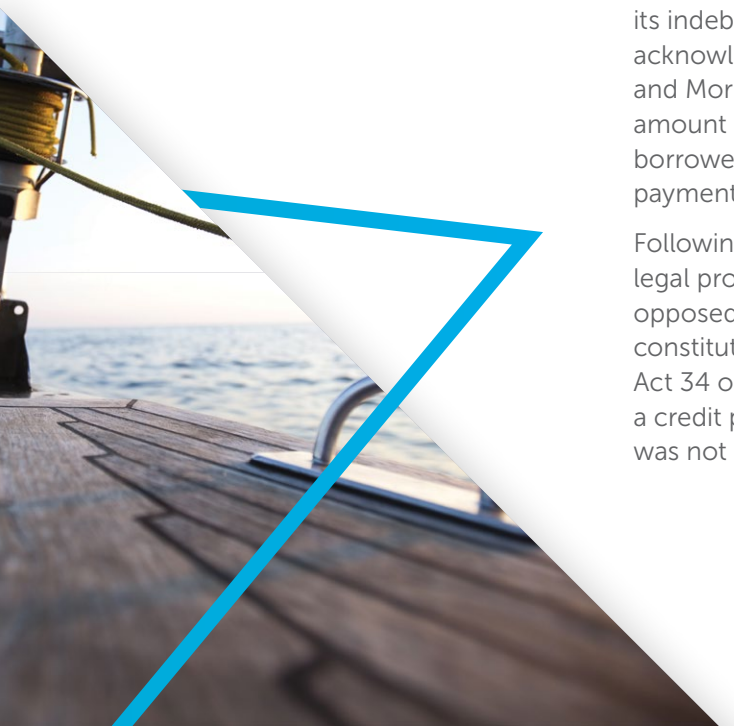
Conclusion

The SCA's judgment marks a clear judicial and regulatory shift toward prioritising sustainability, inclusivity and accountability in energy infrastructure development. This creates both a challenge and an opportunity: a challenge to meet elevated legal and procedural standards, and an opportunity to align with a future-focused energy strategy that favours renewable innovation and community engagement. Project stakeholders are advised to embed environmental and social governance (ESG) principles into every stage of project development.

Zipho Tile and Siviwe Majavu

BANKING, FINANCE & PROJECTS ALERT

High Court judgment on loan agreement dispute when a lender is not registered as a credit provider



On or about 16 January 2023, Baletsema Proprietary Limited (the lender) and Phek Engineering & Suppliers CC (the borrower) concluded a written loan agreement, where the lender advanced an amount of R500,000 to the borrower, with R100,000 payable on or before 17 February 2023 and R600,000 payable on or before 6 March 2023. This was secured by the borrower's immovable and movable property. The loan agreement attracted administration fees and interest at an unspecified percentage but was capped at an amount of R200,000. Additionally, the loan agreement attracted a daily penalty interest of 20%, compounded monthly.

On or about 6 April 2023, the borrower acknowledged its indebtedness to the lender by concluding an acknowledgment of debt (AOD), with Motlhopesi Phekola and Morwadi Phekola standing as the guarantors in the amount of R1,209,600, which was to be paid by the borrower on or before 31 May 2023, with failure to make payment attracting 20% monthly interest.

Following the failure of payment, the lender instituted legal proceedings, which the borrower and the guarantors opposed and raised points in limine that the AOD constituted a credit agreement under the National Credit Act 34 of 2005 (NCA), and the lender was not registered as a credit provider. Thus, the AOD was unlawful as the lender was not registered as a credit provider.

Additionally, it was argued that the lender failed to conduct an affordability assessment, as required by the NCA.

In order to regulate the credit industry and protect consumers from unfair practices, the NCA mandates that any person providing credit must be registered as a credit provider if the credit amount exceeds the prescribed threshold in the amount of R500,000. This is irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement in question is once off.

In *Baletsema Proprietary Limited v Phek Engineering & Suppliers CC and Others* (M521/2023) [2025] ZANWHC148 (13 August 2025), the High Court, having examined the content of the AOD, concluded that the AOD was indeed a credit agreement, as it involved deferred payment and interest charges, thus falling under the purview of the NCA. As a result, the court found that due to the lender's non-registration as a credit provider, the agreement was unlawful and void.

Takeaways

- The judgment underscores the importance of compliance with the NCA's registration requirements for credit providers.
- Entities engaging in credit transactions must ensure that they are registered to avoid agreements being declared void.
- The judgment also highlights the necessity of conducting affordability assessments to protect consumers and ensure fair lending practices.

Mashudu Mphafudi, Kgabi Moeng and Khutso Mongadi

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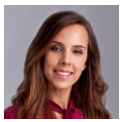

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