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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Imobrite (Pty) Ltd v DTL Boerdery CC (1007/20) [2022] ZASCA 67 (May 2022)

Today the Supreme Court of Appeal (SCA) handed down a judgment upholding, with costs, an appeal against the North West Division of the High Court, Mahikeng (the high court).

The issue before the SCA was whether the North West Division of the High Court, Mahikeng, correctly refused the appellant's application for the winding-up of the respondent close corporation.

The appellant, a private company, agreed to lend an amount of R2 750 000 to the respondent, a close corporation, and the respondent's sole member, Mr Tielman Kotze (Mr Kotze). This agreement was recorded in an acknowledgement of debt (AOD) signed on 15 May 2018. The AOD inter alia acknowledged that the respondent and Mr Kotze had procured a loan from the appellant for the capital amount of R2 750 000 and that they would repay the capital plus interest thereon in ten yearly instalments of R791 495.95. In addition to interest, the respondent and Mr Kotze also agreed to pay a 'facilitation fee' to the appellant. It was agreed that the first instalment would be payable on or before 7 May 2019 and thereafter on or before 7 May of each consecutive year. The AOD also stipulated that in the event that the debtor remained in default 10 days after receiving notice to repair the breach, then the appellant, as the creditor, would be entitled to exercise any remedy at its disposal in terms of the law, including to cancel the agreement and retain all payments already made.

The appellant was a secured creditor of the respondent and held a special and general notarial bond over the respondent's movable assets for an amount of R2 750 000, together with an additional amount of R540 000 in respect of costs. In addition, a first ranking covering mortgage bond had been registered in favour of the appellant over the respondent's farm.

The respondent failed to pay the first instalment by the due date, namely 7 May 2019. As a result, and following various communications between the parties, the appellant launched an application for the winding-up of the respondent. Relying on its interpretation of the provisions of s 69(1)*(a)* of the Close Corporations Act, the high court found that the appellant's application for the respondent's winding-up constituted an abuse of the court's processes. Therefore, the high court dismissed the application with costs, notwithstanding that all the requirements for a winding-up order had been complied with.

The SCA held that, in this matter, it could hardly be disputed that the respondent had no valid defence against the appellant's claim. First, not a single instalment had been paid in repayment of the debt. Second, the indebtedness in respect of the capital amount was not disputed at any stage; instead, the respondent's claim that the debt was incorrectly calculated was based on the alleged miscalculation of interest and the facility fee. Notably, despite remaining in default beyond the 21-day period stipulated in the statutory demand, the respondent failed to tender to pay what it considered to be the correct amount, nor did it make any suggestions regarding how to discharge its indebtedness, save to mention that it and Mr Kotze would obtain alternative financing once the amount of the debt had been corrected. The SCA held that under these circumstances, there could be no merit in the suggestion that the appellant was attempting to enforce payment of a debt which was bona fide disputed. That being the case, it cannot be accepted that the appellant's application was predicated on any reason other than

the bona fide bringing of winding-up proceedings. Therefore, the respondent had not shown that the winding-up proceedings constituted an abuse of the court's process.

In addition, the SCA held that having conceded that the high court's interpretation of s 69 was wrong and that the appellant's application did not constitute an abuse of the court's processes, counsel for the respondent had another string to the respondent's bow; he urged this Court to accept that the discretion to refuse the winding-up order (notwithstanding the appellant's compliance with all the formalities prescribed in s 69(1) of the Close Corporations Act) was properly exercised.

Furthermore, the SCA held that in summing up, it bears emphasising that the exercise of discretion in favour of not granting a liquidation order must be based on a solid factual foundation. Moreover, the SCA held that the factual foundation was missing from the facts presented by the respondent in the answering affidavit. In the face of a compelling case made by the appellant for granting a winding-up order, the respondent did not raise a *bona fide* defence to the claim. Instead, it relied on untenable technical defences. According to the SCA, these were rightly rejected by the high court.

Furthermore, the SCA held that the impression it got from the whole tenor of the high court's judgment was that relying on wrong principles, it accepted that there was no dispute regarding the respondent's indebtedness and exercised the residual discretion not to grant the winding-up order. Hence, the SCA held that it was of the view that the high court's wrong interpretation of the concept 'secured debt' in s 69(1)*(a)* fettered its ultimate exercise of the residual discretion whether or not to grant a winding-up order and resulted in it exercising its discretion in favour of the respondent. The SCA held that the high court exercised its discretion on the basis of a wrong principle. Following this, the SCA held that in the absence of facts supporting the exercise of a discretion in favour of the respondent, there was no justification for the high court refusing to grant the winding-up order. Therefore, the SCA held that this Court was at large to interfere with the discretion exercised by the high court. Finally, the SCA held that the proper exercise of discretion ought to be in favour of granting the winding-up order sought by the appellant. As a result, the SCA held that the appeal ought to succeed.

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