



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Mirchandani v Unica Iron & Steel (Pty) Ltd and Unica Iron & Steel (Pty) Ltd v Mirchandani (Case no 802/2020 & 813/2020) [2022] ZASCA 58 (22 April 2022)

Today the Supreme Court of Appeal (SCA) handed down judgment on two appeals, namely SCA case no 802/2020 and SCA case no 813/2020. In the former case, it upheld, with costs including the costs of senior counsel the decision of the Gauteng Division of the High Court of South Africa, Pretoria (the high court). In the latter case, it dismissed, with costs including costs of senior counsel the appeal against the decision of the same court.

The facts in SCA case no 802/2020, *Mirchandani v Unica Iron & Steel (Pty) Ltd* were as follows: in terms of a written Profit Share Agreement (the profit agreement) concluded between Mr Suresh Chanderbhan Mirchandani (Mr Mirchandani) and the respondent, Unica Iron & Steel (Pty) Ltd (Unica), on 21 May 2007, which profit agreement was backdated to 4 December 2006, the former agreed to work for the latter as a technical director on a profit sharing basis. In the agreement, it was recorded that Mr Mirchandani will be a key person under whose leadership and guidance, Unica would source, commission and run its plant (Unica 1) in Babelegi, Hammanskraal, successfully. It was common cause that pursuant to the profit agreement, Mr Mirchandani sourced, commissioned and ran Unica's plant successfully until his association with Unica 1 was mutually terminated on 30 September 2010. Mr Mirchandani upon leaving Unica, reported the company to the Gauteng Department of Rural Development (GDRD). In the report, he alleged that in establishing Unica 1, the directors deliberately breached the applicable environmental laws, in particular, the provisions of the National Environmental Management Act 107 of 1998 (NEMA), in that Unica 1 operated without ensuring that the provisions of NEMA were duly complied with and that the operation of the company would not endanger the environment. As a result of the complaint that Mr Mirchandani laid against Unica with the GDRD, Unica was charged in terms of the Criminal Procedure Act 51 of 1977 (the CPA) for the contravention of the provisions of NEMA. In terms of s 105A of the CPA, a Plea and Sentence Agreement (the plea agreement) was concluded between Unica and the GDRD in terms of which the former was fined a R5 million penalty, half of which was suspended, plus R3 million in respect of the rehabilitation of the environment.

Unica argued that the profit agreement concluded between it and Mr Mirchandani in 2006 was that the parties, agreed that Mr Mirchandani, as the technical director and the responsible person for ensuring the commissioning of Unica 1, would ensure that Unica complied with the provisions of NEMA. He, however, failed to do so. His failure, so the argument went, was in breach of the profit agreement. The co-directors of Unica, namely Mr Irshad Ul Haq (Mr Ul Haq) and Mr Mohammed Asif Qasim (Mr Qasim) then gave a contradictory testimony and said that they were unaware of the applicability of the provisions of NEMA when the profit agreement was concluded between the parties. The appellant (Mr Mirchandani) on the other hand contended that the provisions of NEMA were not complied with as a result of a deliberate and conscious decision of the board of directors of Unica not to comply with the provisions of the Act, as to do so, would delay the coming into operation of the plant for a period of 18-24 months, which delay the company could ill-afford as the company was eager to commence its

operations and start generating income. The SCA held that, Mr Mirchandani's evidence that the provisions of NEMA were deliberately not complied with was more probable than the contradictory denial of both Mr UI Haq and Mr Qasim. According to the Court, the inevitable conclusion reached was that the three directors, with their eyes open, took a conscious decision not to comply with the provisions of NEMA. In these circumstances, it was inexplicable why one director should take the blame while the other two were absolved. In the circumstances of that matter, non-compliance with the provisions of NEMA should have been shouldered by Unica and its three directors. Unica further claimed for damages on the basis of breach of fiduciary duty in terms of the common law. The SCA held that this claim was also unfounded and untenable. Reasoning that the evidence on record revealed no such breach. It further held that it was undisputed that Mr Mirchandani, as the technical director of the company, complied diligently with the terms of the profit agreement. And because of him being a diligent technical director, at the time of termination of his relationship with Unica, the plant was operational and profitable. During his tenure as the technical director of the company, he pursued the interests of the company rather than his own. As a result, the appeal was upheld by the SCA.

In the SCA case no 813/2020, *Unica Iron & Steel (Pty) Ltd v Mirchandani* the central issue was the accounting action relating to the rental charges and bond repayments raised against Mr Mirchandani's loan account in Unica. Mr Mirchandani testified that the parties agreed to buy a house for him to live in it with his family. At the beginning, the parties agreed that Mr Mirchandani would service the bond used to acquire the house. But this did not meet the approval of Mr Qasim's father who suggested that Mr Mirchandani should rather rent the house until the purchased house was transferred into his name. It was on this basis that the two lease agreements were concluded. On expiry of the first lease agreement, which was for a period of three years, a second lease agreement, also for a three-year period, was concluded. The parties to the lease agreements agreed that Mr Mirchandani would pay rental while the charges for utilities such as water, electricity and taxes would be for the lessor's account. That was to say the utilities were to be paid by Unica and not by Mr Mirchandani. Contrary to the agreements concluded, Mr Mirchandani's loan account in Unica, was, however, debited with the bond repayments instead of the rental charges due and payable by him as well as the charges relating to water, electricity and taxes, which in terms of the lease agreements, as pointed above, were to be for the lessor's account. That resulted in Mr Mirchandani's loan account being debited with bond charges, which were higher instead of the rental amounts which were lower. The net effect was that Mr Mirchandani's share profit was adversely affected. This was the amount which Mr Mirchandani instituted an action for and succeeded in the high court. In addition, Mr Mirchandani claimed for his director's salary as well as wastages, which according to him, were agreed to be capped at 5% to maximise the profitability of Unica 1. This, in turn would, inevitably have no material effect on his 17% share profit in terms of the profit agreement concluded with Unica.

Unica contended that the issue of salaries and wastages was not resolved at the meeting of the directors on 15 April 2010. The SCA disagreed with Unica's contention and reasoned that in both Mr Mirchandani and Mr Qasim's evidence the issue of wastages was resolved in that meeting of 15 April 2010. It referred to the record, where Mr Qasim confirmed the said agreement. The Court further stated that in the pre-trial minutes, the parties agreed on the quantum of damages due to Mr Mirchandani with regard to his accounting claims. It was on that basis that the high court, after finding in favour of Mr Mirchandani, ordered that the agreed amount be paid to him. In the high court and in the SCA, Unica submitted that the lease agreements were a sham and that no legal consequences should flow therefrom. Furthermore, it contended that the lease agreements were concluded solely to enable Mr Mirchandani to comply with the FICA requirements. The onus to prove these allegations rested on Unica. The SCA held that Unica failed to discharge its onus of proof on both the accounting claims and that the lease agreements were a sham, and as a result ordered that the appeal should fail.

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