



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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Constantia Insurance Company Limited v The Master of the High Court, Johannesburg and Others (512/2021) [2022] ZASCA 179 (13 December 2022)

Today, the Supreme Court of Appeal (SCA) handed down judgment dismissing an appeal against a decision of the Gauteng Division of the High Court, Johannesburg (the high court).

The appellant, Constantia Insurance Company Limited (Constantia), proved three claims (the claims) at the second meeting of creditors of Protech Khuthele Property Investments (Pty) Ltd (in liquidation) (Protech Investments). At the instance of the second and third respondents, the joint liquidators of Protech Investments (the liquidators), the first respondent, the Master of the High Court, Johannesburg (the Master), expunged the claims.

Protech Investments was a property-owning company. It formed part of a group of eight companies (the group). Protech Khuthele Holdings Limited (Protech Holdings) was the sole shareholder of Protech Investments. The remaining six companies in the group, all of which were operating companies, were also subsidiaries of Protech Holdings. One of them was Protech Khuthele (Pty) Ltd (Protech Khuthele). At all relevant times, Mr Antony Page was the chief executive officer of the group. On 16 September 2014, the high court placed Protech Investments in winding-up, on the ground that it was unable to pay its debts.

Constantia's business included the provision of performance guarantees. The group approached Constantia to provide performance guarantees in respect of the contractual obligations of the operating companies in the group towards third parties. Constantia agreed to do so, in return for a premium per guarantee and an indemnity in its favour by each of the companies in the group.

On 25 January 2013, Mr Page signed a document entitled 'Deed of Indemnity and Counter Indemnity' (the indemnity). It was also signed on behalf of Constantia and evidenced its

agreement with Protech Holdings and the latter's 'Associated Companies'. This expression encompassed the subsidiaries of Protech Holdings. The effect of the indemnity was that each company in the group undertook an independent obligation to indemnify Constantia in respect of any demand on it or payment by it under any guarantee issued to third parties in respect of the obligations of any company in the group. The claims amounted to some R182 million and related to the various guarantees that Constantia had issued to third parties to secure the obligations of Protech Khuthele. Constantia claimed the demands that had been made on it in terms of these guarantees from Protech Investments under the indemnity. Constantia duly proved these claims on oath to the satisfaction of the officer presiding at the relevant meeting.

The liquidators nevertheless disputed the claims. Consequently, they submitted a report to the Master in terms of s 45(3) of the Insolvency Act 24 of 1936 (the Insolvency Act), stating that fact and the reasons therefor. In essence, they contended that the indemnity constituted financial assistance by Protech Investments to Protech Khuthele, within the meaning of s 45 of the Companies Act. The liquidators reported that they had been unable to find a resolution of the board of Protech Investments authorising Mr Page to bind it to the indemnity or indicating compliance with the requirements of s 45 of the Companies Act.

The issues before the SCA were whether: (a) the indemnity constituted financial assistance by Protech Investments to Protech Khuthele as contemplated in s 45 of the Companies Act; (b) Protech Investments in any event complied with the requirements of s 45 for the provision of financial assistance; (c) Section 20(7) of the Companies Act assisted Constantia's case in the event of such non-compliance; and (d) Section 45(6) of the Companies Act was unconstitutional.

As to (a)

The SCA held that the matters included in s 45(1)(a) are exhaustive of the meaning of 'financial assistance'. In terms of s 45(2), however, s 45 applies to direct and indirect financial assistance. The SCA found that Protech Investments indirectly secured the obligations of Protech Khuthele within the meaning of s 45(1)(a).

As to (b)

The SCA held that in the context of s 66(1) and of the use of the word 'resolution' in s 45(5), 45(6) and 45(7), the expression 'the board may authorise' means that the board of a company must adopt a resolution to provide financial assistance to a company or person mentioned in s 45(2). It found that there was no evidence on record that the board of Protech Investments had adopted a resolution to enter into the indemnity. It also held that there was no evidence that the board applied its mind to the matters mentioned in s 45(3)(b). In the result, Protech Investments provided financial assistance to Protech Khuthele in terms of the indemnity that in material respects did not comply with the requirements of s 45.

As to (c)

The SCA held that the provision that the person dealing with a company in good faith is 'entitled to presume' that the company has complied with all applicable formal and procedural requirements, could not be read as a true presumption. It held that formal and procedural requirements must be distinguished from substantive requirements for the validity of a resolution or agreement. The requirements that the board of a company must resolve to provide financial assistance under s 45 and that it must be satisfied of the matters mentioned in s 45(3)(b), are substantive requirements. It followed that s 20(7) did not avail Constantia.

As to (d)

The SCA held that Constantia did not come close to making a case that s 45(6) should be declared unconstitutional.