



THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY

18 September 2012

STATUS: Immediate

Fourie v FirstRand Bank Ltd (578/11) [2012] ZASCA 119 (18 September 2012)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal (SCA) handed down judgment today in an appeal from the North Gauteng High Court, Pretoria (High Court). The matter concerned the liability of those responsible for the conduct of the affairs of a company for wrongfully contributing to the loss of a creditor.

FirstRand Bank Limited (FirstRand) entered into a financing agreement with a company trading as Supreme Car. Supreme Car breached the agreement, was liquidated and was found to be hopelessly insolvent. FirstRand thus instituted action against the company's de facto financial manager (Fourie) and its erstwhile auditor's deceased estate (Du Preez's Estate). The auditor (Du Preez) committed suicide during the course of the trial.

The action was based in section 424 of the Companies Act 61 of 1973, which allows for the personal liability to company creditors of those responsible for the reckless or fraudulent conduct of the company's affairs. The High Court found Fourie liable on the basis of the statutory claim, but dismissed the claim seeking to hold Du Preez's Estate vicariously liable in delict. In coming to its conclusions, it found that Fourie had knowingly made false representations on behalf of Supreme Car to FirstRand by preparing false financial statements and that he had knowingly been party to the conduct of Supreme Car's business in a reckless way. Du Preez's Estate was however not found to be liable as, even though the financial statements were prepared by Fourie in the course and scope of his employment by Du Preez, because, so the High Court held, FirstRand had failed to establish the requisite causal link between the false statements and the damages that it claimed. Fourie

appealed against the judgment against him while FirstRand lodged a counter-appeal against the dismissal of its claim against Du Preez's estate.

The SCA upheld FirstRand's counter appeal and dismissed the appeal of Fourie. It agreed with the High Court's findings that FirstRand relied on financial statements prepared by Fourie; that Fourie had misrepresented Supreme Car's financial situation; and that the financial statements were held out as a true reflection of the company's financial position. Expert testimony was led showing the documents' misleading nature and Fourie had on two previous occasions admitted under oath that the contents of the documents were indeed misleading. The court rejected Fourie's argument that he could not be held liable as FirstRand's officials were to blame for not having been more careful. In doing so it once again affirmed the principle that where a person fraudulently misrepresents or wilfully conceals, he cannot avert a claim by arguing that the claimant might have known the truth had he been more careful.

The SCA held that section 424 does not require a causal link between the reckless or fraudulent conduct relied upon and a company's inability to pay its creditors. At most, held the court, there was an exemption for liability in cases where there was plainly no causal connection between the impugned conduct and the debt. This case, it found, clearly falls outside of that exemption and Fourie was liable.

And, as opposed to the High Court's finding, Du Preez's Estate was also held liable. The court agreed with the High Court's findings that, but for the misrepresentations of its financial position the incremental credit facility would not have been granted to Supreme Car. The SCA however also found that FirstRand would not have been exposed to the risk of a claim that proved to be irrecoverable had it not been for these misrepresentations. The causal link had thus been proved. Fourie was not only statutorily liable for Supreme Car's debt, but also in delict. As the misrepresentations had been made by Fourie in the employ of Du Preez, Du Preez's Estate was vicariously liable, jointly and severally with Fourie, for the loss suffered by FirstRand.