



## 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  
**DATE** 25 May 2012  
**STATUS** Immediate

*Please note that the media summary is for the benefit of the media and does not form part of the judgment.*

**Visser v Kotze**  
**(519/2011) [2012] ZASCA 73 (25 May 2012)**

#### Media Statement

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Today the Supreme Court of Appeal (SCA) delivered judgment upholding the appeal against an order of the Western Cape High Court, Cape Town. The SCA granted summary judgment in favour of the appellant and dismissed the appeal of the high court with costs on the scale as between attorney and client.

The issue on appeal was whether the high court was correct in refusing summary judgment in favour of the appellants, having found that the respondent's reliance on duress, as a defence, was sustainable.

The facts and history of the matter can be summarised as follows:

The appellant and the first defendant close corporation – Asapi 1046 CC t/a PFC Durbanville - concluded a written loan agreement whereby the appellant agreed to lend the close corporation an amount of R425 000. The first defendant consented to the jurisdiction of the relevant Magistrates' Court in respect of all proceedings associated with the agreement. The present respondent, Ms Ereka Kotze (the third defendant in the Magistrates' Court) and one other, Ms Noleen van den Berg (the second defendant in the Magistrates' Court), signed a written 'Deed of Suretyship' in terms of which they bound themselves as sureties and co-principal debtors with the first defendant for all debts owed by the first defendant to the appellant. The appellants, arising out of the defendants' failure to honour its debt, applied for summary judgment in the Magistrates' Court against the defendants, who in turn opposed the application on the basis that the loan and the

suretyship agreements had been entered into under duress. The magistrate rejected the defence of duress and granted summary judgment. The defendants then noted an appeal to the Western Cape High Court. The close corporation was subsequently liquidated and the liquidators elected not to proceed with the appeal.

The appeal to the high court by the third defendant against the summary judgment order of the Magistrates' Court was successful. The high court found that the respondent successfully established a bona fide defence of duress and refused the appellants' leave to appeal. The appellants then successfully applied to the SCA for leave to appeal against the order of the high court.

The appellants affirmed that the defendants paid a total amount of R96 000 towards the principal debt, however a balance of R329 000 remained outstanding culminating in the legal action undertaken by the appellant for the satisfaction of the debt owing. The SCA stated that one of the ways in which a defendant can avoid summary judgment, is to satisfy the court by affidavit that he or she has a bona fide defence to the claim on which summary judgment is being applied for.

The SCA held that the respondent's affidavit opposing summary judgment had not disclosed a bona fide defence of duress to the appellant's claim, as the evidence disclosed that the requirements of duress had not been satisfied. The SCA held further that the court's discretion should not be exercised against the appellant on the basis of mere conjecture or speculation and found that the material before the court was such that there was simply no basis for the exercise of a residual discretion against the appellant in favour of the respondent.

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