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: 9 February 2024

Status: Immediate

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Cohen v Absa Bank Limited (Case no 1280/2021) [2024] ZASCA 16 (9 February 2024)

Today the Supreme Court of Appeal (SCA) dismissed an application for condonation and reinstatement of the appeal with costs including those of two counsel. It further struck the appeal from the roll with costs including those of two counsel. The appeal emanated from the commercial court of the Gauteng Division of the High Court, Johannesburg (the high court) and was brought by the appellant, Mr Chaim Cohen (Mr Cohen), who was dissatisfied with the high court's order in favour of the respondent, Absa Bank Limited (Absa).

Before the SCA, Mr Cohen applied for condonation and reinstatement of the appeal as, according to rule 8 of the Rules Regulating the Conduct of the Proceedings of the SCA, the appeal had lapsed due to the appeal record not being timeously lodged. This application was opposed by Absa.

In pointing out that Mr Cohen's founding affidavit failed to provide a full and reasonable explanation covering the entire period of the delay, the SCA proposed to consider Mr Cohen's prospects of success on the merits of the appeal before reaching a conclusion on the fate of his application for condonation and reinstatement of the appeal.

In considering the prospects of success on the merits, the SCA crystallised the issue before it as follows: whether s 31(2) of the Insolvency Act 24 of 1936 (the Insolvency Act) affords a shield to a surety and co-principal debtor to escape liability under a deed of suretyship given in favour of a creditor for the due performance by the principal debtor of its obligations under a loan advanced to it by the creditor in circumstances where the principal debtor failed to pay the full indebtedness, was liquidated, and the surety alleges that, before its liquidation, the insolvent in collusion with the creditor disposed of property belonging to the insolvent in a manner which had the effect of prejudicing the insolvent's creditors or of preferring one of them above another.

The upshot of the matter was that on 1 September 2012, Absa initiated action proceedings against Mr Cohen in the high court, claiming the amount of R20 million, interest plus costs, in respect of the liability he incurred under his suretyship. The interest that had accrued on the suretyship capital amount of R20 million attained the *in duplum* limit. Thus, Mr Cohen was sued for payment of the amount of R40 million plus costs on the scale as between attorney and own client, which scale of costs is provided for in the suretyship. Despite having raised several defences against Absa's claim, Mr Cohen abandoned all but one before the conclusion of the trial, which defence raised the interpretation of s 31(2) of the Insolvency Act.

Based on the interpretation contended for by Mr Cohen, he argued that he was released *ex lege* from his suretyship, because Absa forfeited its claim against the insolvent estate of AMU in terms of s 31(2) of the Insolvency Act. That was so because A Million Up Investments 105 (Pty) Limited (AMU) entered into a transaction with Absa in terms of which AMU disposed of property belonging to it in a manner which had the effect of prejudicing AMU's creditors through preferring one of its creditors over the other creditors. Absa, therefore, according to Mr Cohen, was a party to a collusive disposition within the meaning of s 31(1) of the Insolvency Act and, as a creditor, it forfeited its claim against AMU's insolvent estate in terms of s 31(2).

What constituted the collusive disposition to which Absa was a party, according to Mr Cohen, was the disposal of AMU's property to Protea Hotel Group (Pty) Limited (Protea), which took place in terms of the sale agreement concluded between Protea and AMU. In concluding the Amended and Restated Loan Agreement (the ARLA) and the sale agreement, so Mr Cohen argued, AMU, in collusion with Absa, disposed of R14 million as well as a penthouse in the hotel building worth R11 million.

Absa, conversely, asserted as follows: First, it was the sole creditor who might have suffered any prejudice by the penthouse's sale and the R14 million payment to Protea. This is because Absa held a mortgage bond entitling it to the proceeds of the penthouse's sale, and the R11 million and R3 million payments were financed through the loan facility Absa provided.

Second, the ARLA and the sale agreement had a legitimate purpose, not a fraudulent one. Its purpose was to provide AMU with the best chance of trading out of its debt-laden distressed situation. By extending the additional loan facility to AMU, in accordance with the ARLA, Absa facilitated AMU's ability to pay its existing and continuing current creditors. Furthermore, in order to satisfy the debt owed to Absa, the intention of the sale agreement was to secure the full revenue generated from the hotel operations. Absa contended that the absence of evidence refutes a finding of collusion between AMU and Absa, or a finding that the sale agreement, or the ARLA, was concluded or implemented with a fraudulent purpose.

The SCA found that the above assertions made by Absa appeared to contain much force, finding that the anterior question in the matter was whether Mr Cohen has the *locus standi* to invoke one of the remedies outlined in s 31(2) of the Insolvency Act.

After a consideration of the merits, the SCA reasoned that the purpose of s 31(2) is to provide the remedies therein specified to a liquidator who successfully secured an order to set aside a collusive transaction, holding further that an interpretative analysis of s 31(2) leads to the inevitable conclusion that s 31 establishes a unified process whereby the following occurs: (a) a collusive disposition is set aside provided the requirements of s 31(1) have been established; (b) the loss occasioned to the insolvent estate due to the transgressor's actions is made good; (c) a penalty is imposed upon the transgressor; and (d) if the transgressor is also a creditor of the insolvent estate, the ex lege forfeiture of the creditor's claim against the insolvent estate.

The SCA stated that the high court was correct in holding that the interpretation contended for by Mr Cohen was at odds with the text and purpose of ss 31 and 32 and was not supported by the relevant authorities, adding further that the high court correctly rejected Mr Cohen's s 31(2) defence and dismissed his counterclaim due to his lack of standing.

In the result, the SCA concluded that Mr Cohen's s 31(2) defence was unmeritorious and, therefore, did not trump the unsatisfactory explanation for the delay. The application for condonation and the reinstatement of the appeal was dismissed and the appeal was struck from the roll.

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