



CONSTITUTIONAL COURT OF SOUTH AFRICA

Enrico Bernert v Absa Bank Ltd

**CCT 37/10
[2010] ZACC 28**

Judgment Date: 9 December 2010

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 9 December 2010, the Constitutional Court delivered judgment in a matter in which the applicant, Enrico Bernert, sought leave to appeal against the judgment and order of the Supreme Court of Appeal that upheld an appeal against the decision of the North Gauteng High Court, Pretoria (High Court).

At the centre of the litigation was a document entitled “Verbiage of Bank Guarantee” which guaranteed an investment in a fixed deposit facility at a specified interest rate and was issued on the letterhead of Absa Bank, signed by a bank employee and addressed to Emirates Bank. It was required by a potential financial investor in a business enterprise to be undertaken by the applicant. When Absa Bank became aware of the existence of this document, it advised Emirates Bank that it had been issued irregularly and without its authority. The applicant contended that Absa Bank had acted unlawfully in so advising Emirates Bank. The High Court found in favour of the applicant whilst the Supreme Court of Appeal found in favour of the respondent.

In this Court, the applicant alleges that the Supreme Court of Appeal was biased against him on several grounds: (a) one of the judges held shares in the respondent; (b) two of the judges had a prior association with the respondent, in that their previous employer had been funded by Absa Bank; (c) the manner in which the presiding judge conducted the proceedings and (d) the factual findings made by that court, were so unreasonable that they were inexplicable except on the basis of bias.

In a unanimous judgment of the Constitutional Court, Ngcobo CJ held that where there is a realistic possibility that the outcome of the proceedings will affect the shareholding of a

judicial officer in a company that is a litigant before the court, that judicial officer must recuse himself or herself. Having regard to the value, nature and extent of the judge's shareholding in this case, it was held that there was no realistic possibility that the outcome could affect the judge's shareholding or that his shareholding would influence his decision. Ngcobo CJ held that a reasonably informed litigant would not, in these circumstances, reasonably apprehend that a judge would not bring an impartial mind to bear in adjudicating a case simply because the judge held shares in the respondent. He also held that it is not in the interests of justice to permit the applicant to raise the complaint of bias based on a shareholding by one of the judges, given his failure to raise the issue of bias when he first learned of the shareholding 39 days earlier.

On the judges' prior association with Absa Bank, Ngcobo CJ reaffirmed the decision of this Court in *SARFU II* – that previous activities which judges have been involved in will not form the basis of a reasonable apprehension of bias unless the subject-matter of the litigation arises from this association or activity. He found that there was no suggestion in this case that the subject-matter of the litigation arose from the prior association with Absa Bank and, as a result, there was no obligation on the two judges to disclose the association.

The applicant contended that during argument in the Supreme Court of Appeal, the presiding judge called upon his attorney to argue out of turn, displayed a hostile attitude and demeanour to the applicant and his attorney and made disrespectful and humiliating remarks.

The Court also held that the order of argument was no more than an outward manifestation of a provisional view and did not, therefore, establish a reasonable apprehension of bias. Ngcobo CJ found that the presiding judge's alleged hostile attitude and demeanour, as well as the remarks allegedly made by him, if true, reflect unfortunate conduct that amounted to no more than irritation or impatience and does not give rise to a reasonable apprehension of bias.

The judgment then considered the paragraphs of the Supreme Court of Appeal judgment complained of, and found that the applicant's complaints of erroneous factual findings are not borne out by the record and that the applicant did not contest the accuracy of several of the factual findings. Ngcobo CJ found that none of these passages were material to the Supreme Court of Appeal's finding on the authority and regularity of the alleged guarantee. This argument could therefore not be upheld.

The Court accordingly dismissed the appeal with costs.