



**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: 29 January 2021

Status: Immediate

Fusion Properties 233 CC v Stellenbosch Municipality (932/2019) [2021]
ZASCA 10 (29 January 2021)

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 (the SCA) today dismissed an application for leave to appeal against a judgment of the Western Cape Division of the High Court, Cape Town (high court). The application was brought by Fusion Properties 233 CC (Fusion) following the dismissal of its earlier application for leave to appeal by the high court. Fusion's application was, on 29 October 2019, referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013.

Fusion sought to appeal against an order of the high court granted on 15 July 2019 in terms of which it was directed to furnish security for costs in

the sum of R2 626 431. 06. In addition, the high court's order stayed Fusion's pending action until Fusion complied with the order to furnish security.

The order of the high court was granted against the following backdrop. During November 2015 Fusion instituted an action against the Stellenbosch Municipality (municipality) for damages arising out of an alleged breach of contract for some R32 million. It was common cause between the parties that Fusion was an empty shell with no assets whatsoever. Because of Fusion's impecuniosity, the municipality demanded security for costs as it believed that there was no prospect of it recovering its litigation costs if it were successful in resisting Fusion's claim.

Fusion disputed that it was liable to provide security on the principal grounds that the municipality had not demanded security 'as soon as possible after the commencement of the action'. Further, Fusion asserted that there was no reason for the high court to give effect to s 8 of the Close Corporation Act 69 of 1984 which accorded a right to a defendant or respondent in legal proceedings instituted by a close corporation to demand security if it appears that there is reason to believe that the corporation will be unable to pay the costs of the defendant or respondent if successful in their defense. Finally, Fusion contended that requiring it to furnish security would result in it not being able to pursue its claim against the municipality thereby effectively denying it its right of access to a court in breach of s 34 of the Constitution.

The high court rejected all of the grounds upon which Fusion relied in resisting the demand for security.

In pursuit of its application for leave before the SCA, Fusion persisted with the grounds advanced in the high court. The SCA too rejected Fusion's contentions. It held that the high court, in ordering Fusion to furnish security, exercised a discretion in the narrow sense. This meant that the SCA's powers to interfere with the exercise of such discretion on appeal were circumscribed. And that for as long as the high court exercised its discretion judicially it was unassailable.

The SCA also rejected the argument based on s 34 of the Constitution. It held that it was not open to it to ignore the provisions of s 8 simply because s 13 of the Companies Act 61 of 1973 which was the functional equivalent of s 8 was not carried over to the current Companies Act 71 of 2008 when the 1973 Companies Act was repealed.

In the result Fusion's application for leave to appeal was dismissed with costs, including the costs of two counsel.