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: 24 April 2024

Status: Immediate

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ABSA Bank Limited v Rosenberg and Another (1255/2022) [2024] ZASCA 58 (24 April 2024)

Today the Supreme Court of Appeal (SCA) dismissed an appeal emanating from the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) with costs.

The appellant, ABSA Bank Limited (ABSA Bank) appealed against the high court's order, in favour of the respondents, wherein that court dismissed ABSA Bank's claim in its entirety with costs and further dismissed the respondents' counter-application with no order as to costs.

During 2013, a company called Uwoyela Environmental Services (Pty) Ltd (referred to as UES or the Borrower) was awarded a tender by the SFF to recover and reprocess oil sludge from an underground storage facility known as Ogies Storage Facility (Ogies Project). UES was to recover the barrels of oil and to process the product and sell it as either fuel oil and/or crude oil and/or sludge residue to its off takers. The majority shareholder of UES was Oakbrook Holdings (Pty) Ltd of which the second respondent, Mr Terrence Rosenberg, was the majority shareholder. In order to commence and sustain its project, UES approached ABSA Bank and applied for overdraft facilities to fund the Ogies Project.

On 10 August 2018, an agreement was concluded between ABSA Bank and UES, the terms of which were recorded in the Facilities Letter dated 2 August 2018. In terms of the Facilities Letter, UES is referred to as the Borrower and, in terms of the Guarantee Agreement, ABSA Bank is referred to as the Lender. In terms of the Facilities Letter, ABSA Bank would make a primary lending facility of US$2,5 million available to UES, as well as a commercial asset finance facility of R199 000. The security conditions required by ABSA Bank from UES in order to cover its exposure to the latter were fulfilled.

The Ogies Project commenced its business operations in 2014, however, in 2019, due to operational health and safety issues as well as serious cash flow challenges confronting UES, the project was delayed and resulted in UES approaching ABSA Bank for a new funding proposal in order to fund an escrow account required by SFF for the project in an amount of US$23 153 500. After protracted negotiations between the parties, ABSA Bank agreed to rather increase the existing facility under the Facilities Letter as opposed to providing a separate loan, specifying further that the envisaged increase would be effected upon the fulfilment of certain stipulated preconditions. In May 2019, and as a result of due diligence undertaken at ABSA Bank's instance, the bridging loan amount was revised and reduced from US$23 153 500 million to US$18,5 million with certain conditions to be met by UES before the increase was to be effected. It later became apparent that UES was unable to meet all of the stipulated conditions. The negotiations culminated in the signing of the Guarantee Agreement between

ABSA Bank and the respondents in their personal capacities as guarantors, thereby in effect standing surety for the debts of UES owed to ABSA Bank upon the additional funds being made available to UES.

The respondents signed the Guarantee Agreement on 7 August 2019 and on 16 September 2019, UES submitted an application for the increase as previously agreed. On 19 March 2020, ABSA Bank also signed the Guarantee Agreement, however, it had already declined UES' application for an increased facility 13 days earlier. On 6 March 2020 the application for an increase was declined due to UES not being able to fulfil all the conditions precedent.

On 4 May 2021, ABSA Bank addressed a written demand and notice of cancellation of the Facilities Letter to UES in terms of clause 3 of the Facilities Letter. Thereafter, several demands and extensions were made to UES to honour the Facilities Letter Agreement by repaying the amount it owed to ABSA Bank. UES failed to pay. UES' inability to repay the amount due led to an application being made for its provisional winding up. ABSA Bank then turned to the respondents for repayment of the amount that UES owed to it at the time of the demand in respect of the pre-existing debt prior to them signing the Guarantee Agreement. The respondents refused to pay. On 2 December 2021, the Bank brought an application in the high court seeking an order against the respondents for the payment of the sum of R51 153 086.91 with interest thereon calculated at 18,75% per annum capitalized from 24 November 2021 to date of payment; and ancillary relief.

This application was opposed by the respondents on the grounds that ABSA Bank did not fulfil its obligation to increase the facility amount as agreed. In the alternative, they contended that there was a misrepresentation on the part of ABSA Bank, and, further alternatively, that there was a *justus error*, which induced them to sign the agreement, further alternatively, that the common intention of the parties was not properly reflected in the Guarantee Agreement. For the latter reason, they sought rectification of the Guarantee Agreement to reflect the true intentions of the parties, namely that the Guarantee Agreement would take effect only upon ABSA Bank availing the additional funding to UES which it refused to do.

The central issue before the SCA related to the proper interpretation of the Guarantee Agreement concluded between the parties.

In considering the issue on appeal, the SCA stated that the language used in the Guarantee Agreement was clear and unambiguous in that it pointed unequivocally in the direction of an anticipated approval of the increase in funding applied for on behalf of UES. Secondly, the SCA stated that it was important that sight should not be lost of the manifest purpose that the Guarantee Agreement was, on conception, designed to serve and that there can be little doubt that the words 'irrevocably and unconditional' contained in clause 3 of the Guarantee Agreement were intended to take effect once the envisaged increase was approved. The language of the document itself – which is the 'inevitable point of departure' in the interpretive exercise could only mean that the respondents would become liable for UES' existing debt of US$2,5 million only once the facility was increased to US$18,5 million.

The SCA held that to suggest that the Guarantee Agreement would bind the respondents regardless of whether or not the facility was increased to US$18,5 million, would be to ascribe a meaning to the document that would lead to insensible or unbusinesslike results, and as a result fundamentally undermine the apparent purpose of the document in a way that would effectively be foisting on the contracting parties a contract other than the one they in fact made. Ultimately, the SCA concluded that the language of the agreement, the context and the purpose to which it was directed, the sensible commercial meaning that is legally tenable to be ascribed to it, is that for which the respondents contended.

In the result, the appeal was dismissed with costs.

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