



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: 16 May 2024

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Old Mutual Unit Trust Managers Limited v Living Hands (Pty) Ltd and Others (Case no: 18/2023) [2024] ZASCA 75 (16 May 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment upholding with costs, an appeal against the decision of the Gauteng Division of the High Court, Johannesburg (the high court).

The appellant, Old Mutual Unit Trust Managers Limited (OMUT), a financial institution, defended an action instituted in the high court, brought by the first, second and third respondents (the plaintiffs) in their capacities as the trustees of the Living Hands Umbrella Trust (the Trust). The fourth to ninth respondents, former directors and employees of the Fidentia Group of Companies (the Fidentia Group), were joined in the action by OMUT.

The plaintiffs claimed damages in delict. They alleged that OMUT acted wrongfully and negligently and caused the Trust to suffer loss when it paid over to the first plaintiff, Living Hands (Pty) Ltd, a trust administration company, some R1.13 billion of its investment portfolio with Old Mutual, pursuant to the first plaintiff's properly authorised instruction to do so, in terms of an agreement with OMUT. The first plaintiff transferred the investment portfolio to Fidentia Asset Managers (Pty) Ltd (FAM). An amount of R854 654 of these funds were misappropriated by the first plaintiff's directors, whom the first plaintiff referred to as the 'Fidentia wrongdoers'. The plaintiffs further alleged that OMUT did not act with the necessary skill, care and diligence, and in the interests of the investor, as required by the Collective Investment Schemes Control Act 45 of 2002 (CISCA) and other legislation. They alleged that OMUT should have notified the relevant regulatory bodies of the disinvestment, and conducted due diligence on Fidentia Holdings and FAM. The high court upheld the plaintiffs' claim and ordered OMUT to pay damages in the sum of R854 654 together with *in duplum* interest and costs.

In the SCA OMUT argued that it did not act wrongfully or negligently and did not cause the loss. It claimed that the loss was caused by the criminal conduct of the controlling directors of the first plaintiff, who misappropriated the funds.

The main issue on appeal was whether the plaintiffs proved that OMUT, as the manager of the Trust's investment portfolio, had a legal duty to safeguard the funds, and was negligent in preventing their misappropriation by the Fidentia wrongdoers.

The SCA held that OMUT did not have a legal duty to safeguard the funds, and thus did not act wrongfully. The first plaintiff was the author of its own misfortune – its directors misappropriated the funds. The SCA found that none of the statutory and constitutional provisions relied on by the plaintiffs granted them a right of action or a claim for civil damages, and it would be unreasonable and overly burdensome to impose liability on OMUT.

OMUT, the SCA held, did not act negligently. On the evidence the criminal conduct by the Fidentia wrongdoers was not reasonably foreseeable, and there was no duty on OMUT to report the disinvestment to any regulatory authority.

The SCA further held that OMUT did not cause the plaintiffs to suffer any loss: it converted the investment portfolio to cash, which was paid over to the first plaintiff in accordance with the terms of the investment agreement. The factual and legal cause of the loss, the SCA found, was the theft and fraud by the first plaintiff's directors.

The SCA concluded that the plaintiffs, on whom the burden of proof lay, failed to establish wrongfulness, negligence and causation.

As a result, the SCA upheld the appeal with costs, including the costs of three counsel.

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