



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
Date: 30 October 2019
Status: Immediate

The following explanatory note is intended to assist the media in the reporting of this case and is not binding on either the Supreme Court of Appeal or any member of the Court.

London & others v Department of Transport, Roads and Public Works, Northern Cape & others (1035/2018) [2019] ZASCA 144 (30 October 2019)

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against a decision of Northern Cape Division of the High Court, Kimberley (Vuma AJ) in which it dismissed the appeal of four Kimberley businesspersons (the appellants). The appellants, all of whom were shareholders in an entity known as Canton Trading 159 (Pty) Ltd (Canton), sought to hold the Department of Transport, Roads and Public Works, Northern Cape (the Department) liable in damages for the losses allegedly suffered through breach of a legal duty alleged to be owed by the Department to the appellants. The appellants sought this relief through holding the Department alone liable, alternatively in solidum with the Premier of the Northern Cape (the Premier) as well as the MEC of the Northern Cape for Transport, Roads and Public Works (the MEC).

On 27 January 2009, the Department and Canton concluded a written agreement. At issue was clause 32.1 thereof, which provided that Canton was permitted to cede its rights under the agreement to its principal financier, as security for Canton's performance of its obligations to such principal financier, in respect of loan funding to be made available by the principal financier in respect of the written agreement. The clause contained a proviso which made Canton's exercise of this power dependant on the prior written approval of the Department, which approval would not be unreasonably withheld.

In February 2012 the appellants instituted proceedings against the Department. It was alleged that the loan funding arranged by Canton could not be released by the financier because the Department had withheld its consent unreasonably, which ultimately led to Canton's demise. The appellants set out the projected profit which Canton would have made over the next five years and alleged that, but for the Department's allegedly wrongful and negligent act, these

amounts would have been realised and would have been declared to the appellants by way of dividends, and the appellants claimed these amounts in damages.

In response thereto, the Department raised two special pleas – one of locus standi, that because the agreement was between the Department and Canton, only Canton's liquidators had legal standing to sue; and secondly of non-joinder, that since Canton had been liquidated, and in the absence of an allegation that the liquidators had refused to institute action against the Department, the liquidators were necessary parties who should have been joined in the litigation. The appellants amended their particulars of claim by alleging that Canton's liquidators had indeed refused the request to institute action against the Department and, further, that the liquidators would not be proceeding against the Department for any claims arising out of the parties' agreement. Judgment on this issue was delivered on 6 February 2015, Williams J dismissing both of the special pleas with costs.

The Department then brought a substantive application in terms of rule 33(4) of the Uniform Rules of Court, wherein it was averred that the appellants' particulars of claim did not disclose a cause of action. The application was opposed by the appellants, who maintained that the particulars of claim do disclose a cause of action; that, in any event, such points were to be raised by way of an exception; and thirdly, that the issue sought to be advanced by the Department had already been decided by Williams J and was therefore *res judicata*. Matlapeng AJ held that the proper course would have been to except to the particulars under rule 23(1), but that there was nevertheless a degree of overlap between the objects of the two rules and thus granted the application, directing the question whether the appellants' amended particulars of claim disclose a cause of action to be decided at the outset.

After hearing argument on this question Vuma AJ found that it did not, thus upholding the Department's exception, and gave the appellants 20 days to amend their particulars of claim. It was this finding that the appellants sought to overturn in the SCA. The two issues to be decided were whether the exception was rightly upheld, and, secondly, whether the high court was precluded from considering the merits of the exception because of the issue being *res judicata*.

The SCA reiterated the general principles that apply to the relationship between a company vis-à-vis its shareholders in respect of wrongs committed against the company. A company is a legal entity separate from its shareholders, which means that losses suffered by a company through breach of a duty owed to it can only be recovered by the company. A shareholder has no claim to recover a diminution in the value of its shareholding, or the loss of dividends it had anticipated, where that only reflects the loss suffered by the company. Secondly, if a wrong is committed not against the company but against the shareholder, the shareholder is entitled to sue in respect of that loss – even where the measure of the shareholder's loss is the diminution in its shareholding. And thirdly, if a company suffers loss through breach of a duty owed to it, and a shareholder suffers separate and distinct loss to that suffered by the company, through breach of a duty owed independently to the shareholder, both the company and the shareholder may sue to recover the respective losses suffered by them, through breach of the separate duties owed to them, but neither may sue to recover the loss suffered by the other through breach of a duty owed to that other. The appellants failed to allege in their particulars of claim that their loss was separate and distinct from that suffered by Canton, caused by

breach of a legal duty owed to them independently, and on this basis it was held that no cause of action had been disclosed. The exception was rightly upheld by the court of first instance.

On the issue of whether the high court was precluded from considering the merits of the respondents' exception due to the issue being *res judicata*, the SCA confirmed that the question was whether the issue raised in the Department's application under rule 33(4) was the same as that raised in the Department's special pleas. Counsel for the appellants submitted that Williams J made a definitive finding that a cause of action was disclosed in the appellants' particulars of claim, for it was there held that the appellants' claim was delictual as opposed to derivative, arising from the breach of a duty owed to the appellants, and that the liquidators had waived their right to be joined. Counsel for the Department contended that Williams J only had two issues to pronounce on, namely whether the appellants had locus standi and whether the liquidators were necessary parties to the litigation who had to be joined. The SCA agreed with the latter, holding that an affirmative finding on the issues of legal standing and non-joinder was not dispositive of the question whether a cause of action was disclosed in the appellants' particulars of claim.

The appeal was accordingly dismissed, with costs, and the period of 20 days which the high court granted the appellants to amend their particulars of claim was held to begin running from the date of the SCA judgment.
