



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

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Status: Immediate

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Estelle Le Roux and Another v Dielemaar Holdings (Cape) Pty Ltd and Another (414/2023) [2024] ZASCA 118 (25 July 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment, wherein leave to appeal was dismissed with costs, against the decision of the Western Cape Division of the High Court, Cape Town (the high court).

This matter involved a dispute over three commercial property lease agreements between Dielemaar Holdings (Cape) Pty Ltd, IPIC Properties (Pty) Ltd (the respondents) and a close corporation known as Be Positive Trading (the principal debtor). Estelle Le Roux and Marthinus van der Spuy Le Roux (the applicants) had stood as sureties and co-principal debtors *in solidum* in terms of the deeds of suretyship for the principal debtor's debts arising from the lease agreements in favour of the respondents. The principal debtor fell into arrears in respect of the rental payments of all three leases. On demand for payment, the principal debtor was unable to pay.

The respondents instituted action against the principal debtor and sureties in the magistrate court. These actions were consolidated and scheduled for a regional court hearing. The applicants defended the actions and also lodged a counterclaim. The regional court rejected the respondents' summary judgment application due to an arbitration clause in the third lease, resulting in a stay of proceedings pending arbitration. In the arbitration proceedings, initiated in December 2013, the sureties raised the arbitrator's lack of jurisdiction to determine their liability of debt, which resulted in the sureties being discharged from the arbitration. On 22 July 2015, the arbitration proceedings continued against the principal debtor. However, the principal debtor was in default of appearance. As a result, the arbitrator made an award upholding the claims against it and dismissing its counterclaim. The arbitrator's award was made an order of the high court on 29 March 2016. In July 2016, the respondents then instituted the action in the high court against the applicants, in their capacities as sureties and co-principal debtors.

In the high court, the applicants argued that the respondents' claim had prescribed under the Prescription Act 68 of 1969 (the Prescription Act), as the service of summons in the magistrate's court had not been successfully prosecuted to final judgment. They contended that the interruption of prescription had therefore lapsed. The respondents raised the defences of *res judicata* or issue estoppel of the applicants' counterclaims. They argued that the applicants' counterclaim had been dismissed in the earlier arbitration proceedings, which had been made an order of the high court.

The high court dismissed the applicants' application, finding that the respondents' claim had not prescribed and that the applicants were estopped from raising the counterclaim that had been previously dismissed in the arbitration. The high court also dismissed the applicants' leave to appeal. Aggrieved by the high court decision, the applicants petitioned this Court. The petition was referred to hearing, to determine whether there were prospects of success, should leave to appeal be granted.

The main issue on appeal in this Court was whether the respondents' claim against the applicants as sureties and co-principal debtors had prescribed and whether the applicants were precluded from raising a counterclaim that had previously been dismissed in arbitration proceedings.

In its findings, the SCA accepted that the appointment of the arbitrator in December 2013 had interrupted the running of prescription under the Prescription Act, and this interruption continued until the final arbitration award was made in July 2015. The fact that the applicants had withdrawn from the arbitration proceedings did not affect the interruption of prescription for the principal debtor, for whose debts the applicants were jointly liable as co-principal debtors.

Regarding the *res judicata* defence, the SCA found that the applicants, by withdrawing from the arbitration, had failed to prosecute the counterclaim raised by the principal debtor. The arbitrator had dismissed the counterclaim, and this dismissal was made an order of the high court. The SCA held that the applicants were thus estopped from raising the same counterclaim again in the current proceedings.

The SCA upheld the high court's decision, finding that the applicants' arguments on prescription had no merit. Furthermore, it concluded that the high court's reasoning and conclusions were correct, and that the proposed appeal had no reasonable prospect of success.

Accordingly, the SCA dismissed the application for leave to appeal with costs.

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