



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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Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd (326/2021) [2022] ZASCA 143 (24 October 2022)

Today the Supreme Court of Appeal (SCA) upheld Imperial Logistics Advance (Pty) Ltd's (the appellant) appeal with costs including costs of two counsel. It further dismissed the application for postponement by Remnant Wealth Holdings (Pty) Ltd (the respondent) and set aside the order of the Gauteng Division of the High Court, Pretoria (the high court), replacing it with an order placing the respondent under a provisional liquidation order.

The appeal was set down for hearing in the SCA on 25 August 2022. The respondent sought postponement. The reasons advanced for the application for postponement by the respondent were that the respondent was not aware of the set down date, as its correspondent attorneys in Bloemfontein had emailed a notice of set down to one Mr Madhi, who at the relevant time was no longer with the firm. Mr Ntaka, who took over the matter after the departure of Mr Madhi, did not have access to Mr Madhi's email account. Mr Ntaka fortuitously became aware of the set down date on 26 July 2022 when the firm's secretary, who had access to the central email account for the firm, brought him the appellant's replacement heads which the correspondent attorneys had transmitted to Mr Madhi's email account. Mr Ntaka notified the respondent's junior counsel of the date of the set down of the appeal. Counsel informed Mr Ntaka that he and the senior counsel were not available on 25 August 2022 to argue the appeal.

The respondent's attorneys of record further alleged that seeing that the appellant had by then replaced the heads of argument that it had initially served and filed, it became apparent to the respondent that it would be prejudicial to it to appoint new counsel as the new counsel would have to read the voluminous record to prepare for the appeal. The appellant opposed this application stating that unavailability of counsel is not an excuse as the SCA and the Constitutional Court's matters take precedence over matters in other courts. The SCA, in dismissing the application for postponement, held that the explanation given by the respondent is not satisfactory, that the record was not voluminous as suggested by the respondent and that neither were the issues of fact and law complex.

Regarding the merits, the respondent is indebted to one of the appellant's trading divisions, KWS Logistics (KWS), in an amount of more than R80 802 540.29 plus interest. KWS rendered transport services to the respondent as a subcontractor. It rendered these services, on behalf of the respondent, to the respondent's sole client, South 32 SA Ltd (South 32). The respondent received an aggregate

amount of more than R304 405 111.03 from South 32 for the services rendered by KWS. Despite the respondent's receipt of such payments from South 32 and the respondent executing an acknowledgement of debt (AOD) in favour of KWS, the respondent failed to pay the substantial amounts owed by it to KWS. The reasons for its failure to make such payment to KWS are inexplicable. So too, is its refusal to account for the revenue received by it from South 32.

On 27 July 2020, the appellant brought an application for the liquidation of the respondent on an urgent basis, on the grounds that the appellant is a substantial unsatisfied creditor of the respondent as contemplated by s 346(1)(b) of the Companies Act, 1973 (the Act); the respondent is commercially and factually insolvent; the respondent is unable to pay its debts as envisaged in s 344(f), as read with s 345(1)(c) of the Act; and it is also just and equitable that the respondent be wound-up as provided for in terms of s 344(h) of the Act.

This liquidation application was preceded by an application brought on an *ex parte* basis, in which the appellant sought the freezing of the respondent's bank accounts, getting access to its bank statements and their financial interest, and interdicting and restraining the respondent and its director from disposing of, encumbering or dealing with their property and vehicles pending the outcome of the proceedings that were to be brought (anti-dissipation application). The anti-dissipation order was granted on 30 June 2020 with a return date of 25 August 2020.

The liquidation and anti-dissipation applications were later consolidated, and heard by the high court. On 1 December 2020, the high court discharged the rule *nisi* relating to the anti-dissipation application and dismissed the application for the liquidation of the respondent for want of urgency. The appellant's application for leave to appeal against the discharge of the rule *nisi* was dismissed. The high court granted the appellant leave to appeal against an order dismissing the liquidation application.

The issues on appeal concern firstly, whether the high court was correct in determining that the winding-up application was not urgent and dismissing it on that ground, and secondly, whether a case for the winding-up of the respondent had been made out.

In addressing the first issue of lack of urgency, the SCA held that the high court erred as winding-up applications are, in general by their nature, urgent. The SCA went further to state that the urgency alleged by the appellant lay in the fact that the respondent's director had made false statements to it regarding the source of funds which he represented would permit payment to be made by the respondent of the amounts owed to the appellant and also lay in the fact that the respondent had been receiving payment from South 32 but was not paying the appellant.

In reaching a conclusion on the second issue regarding whether a case for the winding-up of the respondent had been properly made out, the SCA held that the appellant had *prima facie* established the respondent's indebtedness because it is common cause, alternatively, it cannot be seriously disputed that: KWS rendered transport services to the respondent (as a subcontractor) for its transport services obligations to South 32, and KWS issued valid tax invoices to the respondent for the services rendered.

Regarding whether or not the respondent had established that it had reasonable grounds for disputing the existence of the appellant's claims, the SCA held that, *prima facie*, the respondent's defences do not have prospects of success and that the appellant would suffer more prejudice if postponement were to be granted than if it was refused. The SCA held further, that the respondent's indebtedness to the appellant is substantial, and the appellant, as an unpaid creditor, has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt.

In the result, the SCA made an order dismissing the respondent's application for postponement with costs, upholding the appeal with costs including costs of two counsel and setting aside the order of the high court, replacing it with an order placing the respondent under a provisional liquidation order.