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: 9 May 2022

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

Kgoro Consortium (Pty) Ltd and Another v Cedar Park Properties 39 (Pty) Ltd and Others (935/2020) [2022] ZASCA 65 (9 May 2022)

The Supreme Court of Appeal (SCA) today dismissed an appeal with costs brought by the appellants against the decision of the Gauteng Division of the High Court, Johannesburg (the high court). The SCA, in addition, upheld with costs a further appeal brought by the attorneys for the appellants, and thus set aside the decision of the high court that they pay costs *de bonis propriis* on a punitive scale.

The first appellant, Kgoro Consortium (Pty) Ltd (Kgoro), brought an application in the high court for the placing of the first respondent, Cedar Park Properties 39 (Pty) Ltd (in liquidation) (Cedar Park), under supervision and commencing business rescue proceedings. The second appellant, Regiments Capital (Pty) Ltd (in liquidation) (Regiments) intervened to support the application. The second respondent, Vantage Mezzanine Fund II Partnership (Vantage), opposed the application. The high court dismissed the business rescue application (para 2 of the order). Additionally, the high court ordered the attorneys for the appellants, Smit Sewgoolam Incorporated (Smit Sewgoolam) to pay Vantage's costs *de bonis propriis* on the attorney and client scale (para 3 of the order), as well as directed the Registrar of the high court to forward a copy of its judgment to the Gauteng Legal Practice Council for an investigation into the conduct of the responsible attorney at Smit Sewgoolam (para 5 of the order). The appellants appealed against para 2 of the order (the Kgoro appeal). Smit Sewgoolam appealed against paras 3 and 5 of the order (the Smit Sewgoolam appeal). Regiments did not participate in the appeal.

With regard to the Kgoro appeal, the background of the matter was as follows. Cedar Park was a wholly owned subsidiary of Kgoro. Regiments was the majority shareholder in Kgoro. Cedar Park was used as a special purpose vehicle for the purchase of the property described as the Remaining Extent of Erf 575, Sandown Extension 49 Township, Gauteng (the property) and the development thereof by the construction of residential units, shops, business premises and hotels. The property

was secured from the City of Johannesburg Metropolitan Municipality (City of Johannesburg), the third respondent, for the sum of R280 million, with payment to be made once the property was developed. On 5 June 2013, Cedar Park concluded a loan facility agreement with Vantage in the amount of R150 million in respect of the development of the property, which became due and payable, together with interest, on 30 June 2018. Kgoro provided a guarantee for Cedar Park's indebtedness to Vantage. As a consequence, Kgoro pledged and ceded all rights, title and interest in its shares in Cedar Park in favour of Vantage as security for the guaranteed obligations. It was common cause that Cedar Park failed to meet its obligations in terms of the loan facility agreement. As a consequence, on 6 December 2018, Vantage launched an application for the winding-up of Cedar Park for failing to make payment in the amount of more than R300 million that was due and owing. However, on 15 February 2019, before the liquidation application was heard, Kgoro lodged the application to place Cedar Park under supervision and commence business rescue. The application for liquidation, therefore, had to be removed from the court roll. Vantage consequently brought an application to intervene in the business rescue application. This was followed by the application to intervene in the proceedings by Regiments. The application came before Twala J, in the high court.

It was common cause that Cedar Park was financially distressed in terms of the Companies Act. The SCA found that the question, therefore, turned on the consideration of whether the appellants had made out a case for achieving any of the two objectives set out in s 128(1)*(b)*(iii) of the Companies Act. The SCA thus found that Kgoro bore the onus to prove that Cedar Park would have reasonable prospects of recovery. This was a factual question, for which a material foundation needed to be laid out in its founding affidavit.

The SCA found that the contentions raised by Kgoro went against the principles set out in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA), wherein it was held that the requirements for granting an order in terms of s 131 of the Companies Act entailed that the company under consideration must have had reasonable prospect of recovery or of a better return. The SCA held that Kgoro failed to meet the threshold required to put Cedar Park under supervision and commence business rescue. It followed that it was not necessary to consider Vantage's contentions as to lack of *locus standi* on the part of Kgoro. The Kgoro appeal thus failed.

With regard to the Smit Sewgoolam appeal, the SCA found that the court a quo, in essence, penalised Smit Sewgoolam for failing to disclose that a previous order of the high court had interdicted the implementation of an agreement of sale called the Cedar Park Sale of Development Enterprise Agreement (the Sale of Enterprise Agreement), concluded in 2018, as a purportedly financially viable offer on the table from a potential buyer of the Kgoro Sandton development.

The SCA held that costs *de bonis propriis* should only be ordered in exceptional circumstances, and such an order may not be made against a party or person that had not been afforded a proper opportunity to respond to the allegations in question and to state his or her case in respect of the envisaged costs order. The SCA found that the court a quo had not called upon Smit Sewgoolam to explain itself. In the circumstances, it was denied an opportunity to state its case. The SCA thus held that its appeal against the punitive costs order (para 3 of the high court's order) succeeded with costs.

Lastly, the SCA held that there was no basis to interfere with the referral of the judgment to the Gauteng Legal Practice Council under para 5 of the high court's order. This, on the basis that there were prima facie reasons for an investigation into the attorney's conduct in question.

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