

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 23 March 2010
STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Johan de Lange v Absa Makelaars (Pty) Ltd (262/09) [2010] ZASCA 21 (23 March 2010)

Media Statement

Today the Supreme Court of Appeal upheld an appeal against a judgment of the Cape Town High Court which had allowed claims by Absa Makelaars (Pty) Ltd (ABSA) against one of its previous employees, Johan de Lange (De Lange), for recovery of amounts paid out by ABSA to several of its clients.

De Lange was previously employed by ABSA as a broker. ABSA alleged that, acting in the course of his employment, De Lange gave financial and investment advice to certain clients of ABSA, which advice was incorrect or incomplete and that, in giving such advice, De Lange acted intentionally or, alternatively, negligently. The clients in question allegedly suffered loss as a result of De Lange's advice, for which they were compensated by ABSA.

The appeal turned on the interpretation of a clause in the contract of employment between ABSA and De Lange and, in particular, whether the clause obliged ABSA to give De Lange a hearing before making a decision which rendered De Lange liable to reimburse ABSA for 'damages' which the latter had paid out to its client or clients under certain circumstances. The clause provided that, if ABSA was held liable for loss or damage suffered as a result of intentional or negligent incorrect or incomplete advice given by De Lange, ABSA would have a right of recovery against De Lange for any such loss or damage as was paid by ABSA if the latter was 'of the opinion that it was legally liable therefore.'

In forming the opinion in respect of the claims instituted by ABSA against De Lange in the High Court, ABSA did not contact De Lange and give him the opportunity to explain his version of events. The High Court held that ABSA could decide the question before it without hearing either party, provided it acted *arbitrium boni viri* (ie with the judgment of a fair-minded person), and that it could form its opinion independently on its own knowledge and opinion. The SCA did not agree. It held that, on a proper interpretation of the relevant clause, it contained a tacit term that, as part of the process of forming an opinion in regard to the question whether it was legally liable to the third party concerned, ABSA had to give De Lange the opportunity to give his version of events. This term was necessary in the business sense to give efficacy to the contract – it was such a term that one could be confident that, if at the time the contract was being negotiated, someone had said to the parties: "What will happen in such a case?" they would have both replied: "Of course, so-and-so. We did not trouble to say that; it is too clear."

As it was common cause that this tacit term was not complied with by ABSA in forming its opinion and making its decision in respect of the claims in question, it followed that ABSA's claims against De Lange, based entirely on the provisions of the clause in question, should have been dismissed by the High Court. The SCA thus upheld the appeal with costs and replaced the order of the High Court with an order that ABSA's claims against De Lange were dismissed with costs.

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