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 29 November 2010

STATUS Immediate

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

Desert Star Trading v No 11 Flamboyant Edleen
(98/10) [2010] ZASCA 148 (29 November 2010)

Media Statement

Today the Supreme Court of Appeal (SCA) dismissed appeals by Desert Star Trading 145 (Pty) Ltd (Desert Star) and Bridging Advances (Pty) Ltd (Bridging) against a judgment of the Pretoria High Court refusing to place No 11 Flamboyant Edleen BK (the CC) under winding-up.

Unable to raise a loan from any of the established banking institutions, but being desperately in need of financial assistance, George Ehlers turned to small private lenders although, as he put it, he knew he 'was going to pay a heavy price for the loan'. One such private lender to whom Ehlers turned during 2007 was Desert Star, the first appellant. Not being creditworthy he did not qualify for a loan. The loan application was then revised and re-submitted in the name of his son, Eugene. The amount lent and advanced together with interest and costs by Desert Star to Eugene was the sum of R859 600. On 8 June 2007 Eugene acknowledged his indebtedness in writing to Desert Star and undertook to effect repayment of that sum within twelve months. The agreement provided that in the event of the loan remaining unpaid after 8 June 2008 then the interest would be recalculated with effect from the date of the agreement at the rate of 1.5% per week compounded. As security for the loan, Ehlers in his capacity as the sole member of the first respondent, the CC, bound it as a surety and co-principal debtor in favour of Desert Star in respect of the indebtedness of Eugene. And as further security a security bond was registered in favour of Desert Star over an immovable property, the sole asset of the CC. Eugene failed to repay the loan and as at 30 May 2008 his indebtedness to Desert Star stood at R1 253 000.

In the meanwhile on 29 January 2008 Ehlers approached another small private lender, the second appellant, Bridging, for a loan. This time the application was made in the name of his wife, Lèone Ehlers. A written agreement was concluded in terms of which Bridging loaned and advanced the sum of R160 053 (being R150 000 plus interest and costs) to Ms Ehlers. Here as well Ehlers bound the CC as a surety and co-principal debtor in favour of Bridging for the indebtedness of Ms Ehlers. And as further security a mortgage bond was registered in favour of Bridging over the Ehlers family home which was registered in the name of Ms Ehlers. Sporadic payments in the total sum of R41 000 were effected by the Ehlers to Bridging, but given the annual interest rate of 42.2% applicable to the loan, the outstanding balance had grown by 6 February 2009 to R205 363.55.

The SCA considered the nature of the debt secured by the CC. In each instance the appellants' relied upon a deed of suretyship. The SCA held for there to be a valid suretyship there had to be a valid principal obligation. It follows that a surety is not liable to a person to whom the principal debtor is not liable. It was common cause that each of the underlying principal agreements was a credit agreement as defined in s 8(4)(f) of the National Credit Act. On behalf of the CC it was contended that when Desert Star contracted with Eugene it was not a registered credit provider as required by the Act and that in consequence the agreement concluded with him was ab initio void. In addition, it was contended that both Desert Star and Bridging are in common parlance 'loan sharks' and that each of the principal agreements constitutes reckless credit agreements that are liable to be set aside or suspended in terms of the Act. The SCA held that an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by a company. Consequently, where it is shown on a balance of probability by a company that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding-up order.

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