



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 29 November 2010

Status: Immediate

J L C FOURIE NO & OTHERS v J D NEWTON

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

1. In 2002 companies in the CNA group were liquidated. One such company was Consolidated News Agencies (Pty) Ltd, the liquidators of which brought civil proceedings in the Cape High Court against Mr Newton (who was the only member of Consolidated's board that carried director's and officer's liability insurance).
2. The liquidators alleged that Consolidated should have been liquidated shortly after Wooltru Ltd sold its shares in the CNA group to a shelf company in March 2001, and that the directors of Consolidated had acted recklessly in continuing to trade until Consolidated was ultimately liquidated in July 2002. The liquidators accordingly sought an order declaring Newton liable without limitation for all of the debts of Consolidated, which amounted to approximately R262 million.
3. The Cape High Court dismissed the claim. The decision was confirmed on appeal by the SCA.
4. The liquidators called an accounting expert who pointed out that in each month (with two exceptions) from March 2001 until its liquidation, Consolidated recorded losses; that in general, budgeted profit or loss had not been achieved; that there were material negative

deviations from the budgets; and that the results were as bad as, or worse than, in prior years. The expert also expressed the view that absent clarity and commitment in respect of future funding, it was reckless for Consolidated to continue trading once Wooltru had sold the shares in the CNA and therefore withdrawn its financial support. Newton and other expert witnesses, however, testified that a number of funding opportunities were available to Consolidated that were being exploited. Furthermore merchant banks, firms of attorneys and accountants who were intimately acquainted with the financial affairs of the CNA never suggested that Consolidated should be liquidated; a major bank had advanced overdraft facilities to the CNA group exceeding R70 million; and management had sought to acquire equity in the group by way of a management buyout.

5. The SCA reasoned that the essential question was whether the board had acted recklessly ie that their conduct evinced an entire failure to give consideration to the consequences of their actions to exploit other sources of funding. The answer to that question, said the court, would in the first place depend on the amount of funding required, for how long it would be required, and the likelihood of it being obtained — whether timeously or at all; and in the second place, on how realistic the possibility was that the company's fortunes would be turned around ie whether there was a credible business plan or strategy that had been or could be implemented to rescue the company. The court continued that in evaluating the conduct of directors, courts should not be astute to stigmatize decisions made by businessmen as reckless simply because perceived entrepreneurial options did not in the event pan out: a business that may appear on analysis of past performance to be a hopeless case, may legitimately be perceived as a golden opportunity for a turnaround strategy. What is required is not application of the exact science of hindsight, said the court, but a value judgment bearing in mind what was known, or ought to have been known, by individual directors at the time decisions were made.

6. The SCA concluded that on the evidence, it could not be said that any member of the board of Consolidated had traded recklessly. The appeal was accordingly dismissed.

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