



THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Picbel Groep Voorsorgfonds v Somerville (405/12) [2013]
ZASCA 24 (22 March 2013)

The Supreme Court of Appeal (SCA) handed down judgment today in an appeal from the South Gauteng High Court, Johannesburg (High Court). The matter concerned the implications of a settlement agreement for the right of one joint wrongdoer to claim a contribution from other joint wrongdoers in terms of section 2(12) of the Apportionment of Damages Act 34 of 1956 (the Act).

The matter arose from a delictual claim instituted by the curators or liquidators of various pension funds (the funds) against Alexander Forbes Financial Services (Pty) Ltd (Alexander Forbes) for losses incurred by the funds as the result of an unlawful scheme known as the Ghavalas Option. Alexander Forbes had been one of several wrongdoers in respect of the harm suffered by those funds.

In response, Alexander Forbes had given notice of the action instituted by the funds to the various respondents in this matter, pursuant to section 2(2)(b) of the Act. That provision provides for a notice of such actions to be given to any joint wrongdoers, enabling them to intervene in the action as a defendant. None of the joint wrongdoers to whom Alexander Forbes gave notice chose to intervene in that action.

Alexander Forbes then settled the damages claims with the funds pursuant to a settlement agreement. The agreement settled around a third of the total damages claimed by the funds. Moreover, the settlement agreement provided for a cession to the funds of Alexander Forbes' claims against all joint wrongdoers, a right which arises from section 2(12) of the Act.

The funds then instituted an action in the High Court against the respondents for the remainder of the loss suffered, in a purported exercise of the rights which had been ceded to them by Alexander Forbes. The respondents excepted to the summons instituted on various bases. The exception relevant on appeal claimed that only a *full settlement* of a claim attracted the application of section 2(12) of the Act, which entitled a joint wrongdoer to recover a contribution from other joint wrongdoers, and that as the settlement agreement with Alexander Forbes had not settled the claim in full the section was thus of no application. Alexander Forbes, so the exception claimed, therefore had no right against the respondents which it could cede to the funds, and the funds therefore had no cause of action.

In the High Court, Sutherland J upheld that exception, and granted the funds leave to appeal to the SCA.

A majority of this court, per Plasket AJA, held that a jurisdictional requirement of s 2(12) read with s 2(6) of the Act is that the settlement must have constituted a full settlement of that claim. In interpreting the relevant clauses of the settlement agreement between the funds and Alexander Forbes, the court held that it did not amount to a full settlement of the funds' claim, instead serving only to settle that portion of the claim for which the funds regarded Alexander Forbes to be liable. Consequently, a jurisdictional requirement for the application of s 2(12) of the Act remained unfulfilled, and the provision could not be invoked – Alexander Forbes did not acquire any right of recourse against the other joint wrongdoers, and thus could not cede any such right to the funds. The exception was thus upheld, and the appeal dismissed.

In a dissenting judgment, Ponnann JA held that the settlement agreement was at least capable of an interpretation, which sustained a claim based on the relevant provisions, as in his interpretation the Act's requirement that a settlement be in full imposes a standard of finality, regardless of whether the actual amount of the claim is satisfied. In his view, the funds had therefore met the threshold set on exception – namely that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed. He would have upheld the appeal.