



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
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STATUS Immediate

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

Absa Bank Limited v Hammerle Group (Pty) Ltd
(205/2014) [2015] ZASCA 43 (26 March 2015)

Today the Supreme Court of Appeal (SCA) delivered a judgment upholding the appeal by the appellant, Absa Bank Ltd and set aside the order of the court a quo.

The issue before the SCA was whether the court a quo erred in dismissing the winding-up application of the respondent on the ground that the debt giving rise to the application was extinguished by prescription and the remainder thereof of was not yet due and payable.

Pursuant to a loan agreement concluded between the parties on 6 December 2007, the appellant advanced a loan of R4 million to the respondent, which together with interest thereon would be repayable in 60 instalments of R 96 045,70 from 1 January 2008. The purpose of the loan was to finance the respondent and its business. The loan agreement was secured by a Special and General Notarial Covering Bond which was registered by the Registrar of Deeds.

On 19 November 2007 the appellant, the respondent, Mfiso Investments (Pty) Ltd and Uwe Christian Hammerle concluded a Subscription and Shareholders Agreement (the subscription agreement) in terms of which the appellant loaned and advanced to the respondent the sum of R10 million. The purpose of this loan, which took on the form of a shareholders loan, was to enable the respondent to fund the acquisition of the respondent's business and assets. By virtue thereof, the appellant acquired a minority shareholding in the respondent. In terms of the subscription agreement the loan was repayable in 60 (sixty) equal monthly instalments consisting of the capital repayment amount and interest and became repayable immediately under certain circumstances. On 31 May 2011 the

respondent was indebted to the appellant in the total amount of R 21 005 197,46, the respondent denied that it was indebted to the appellant and claimed that the appellant's claim under the loan agreement prescribed and consequently the debt had become extinguished. The debt under the subscription agreement was subordinated to other creditors of the respondent.

On appeal, the SCA held that the appellant was well within its right to have applied for the winding-up of the respondent and that the court a quo erred when it refused to wind-up the respondent on the basis that the debt was not yet due and payable, as it had been subordinated to other creditors of the respondent.

The SCA found that the respondent unequivocally acknowledged its indebtedness to the appellant in the letter of 24 June 2011 and this interrupted prescription. This unequivocal admission of liability by the respondent was made in response to a letter of demand for payment of the arrear instalments due in terms of the loan agreement. The SCA held further that the court a quo clearly misdirected itself in refusing to wind-up the respondent on the basis that the debt arising from the loan agreement had become prescribed.

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