

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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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.

Gihwala v Grancy Property Ltd

The SCA today handed down judgment in a commercial dispute between, on the one hand, Mr Dines Gihwala and Mr Lance Manala and Grancy Property Ltd (Grancy). The dispute arose from a BEE transaction in which Spearhead Property Holdings Ltd made available 3.5 million units at a favourable price below the then current market value of the units. A company called Seena Marena Investments (Pty) Ltd (SMI), owned jointly by Mr Gihwala's family trust and Mr Manala, was given the opportunity to acquire a 40% interest in a company specially established to acquire the BEE units. When a further 18% interest became available they involved a British businessman and friend of theirs, Mr Karim Mawji. The agreement concluded with him led to this dispute.

On 3 February 2005 the parties concluded an agreement in terms of which Mr Mawji, through Grancy, would acquire a one-third share in SMI, which would in turn acquire a 58% stake in the company owning the Spearhead units. To that end Grancy provided funding of around R3.5 million. Disputes arose when Mr Gihwala and Mr Manala refused to recognise that Grancy was entitled to a shareholding in SMI or any information about its business or how its money had been invested. This

has led to extensive litigation both in the Western Cape Division of the High Court and in the SCA.

In the trial the High Court granted judgment in favour of Grancy on a number of monetary claims arising from the breach of the 3 February agreement. It also ordered that books of account be produced and made available to Grancy and that there be a debatement of account between the parties. Lastly it declared Mr Gihwala and Mr Manala to be delinquent directors, an order that had the effect of precluding both of them from being directors of companies for a period of seven years.

The SCA upheld the majority of the monetary claims and a cross-appeal in regard to one claim, as well as a cross-appeal that Mr Gihwala's family trust should be jointly and severally liable with him and Mr Manala for most of those claims. It set aside the judgment in regard to two claims and reduced the amount payable in terms of a third. It also varied the order in regard to the provision of access to books and records of SMI and set aside the order to furnish an account, in part on the basis that this was a matter already being dealt with by the High Court in the Western Cape.

A constitutional challenge to section 162(5)(c) of the Companies Act 71 of 2008 was rejected. The SCA held that the disqualification of delinquent directors was a proportionate response by the legislature to the problem of delinquent directors. It upheld the orders of delinquency in relation to both Mr Gihwala and Mr Manala, holding that they had been guilty of gross abuses of their positions as directors of SMI, to which they owed a fiduciary duty to ensure that it complied with the terms of the agreement concluded with Grancy. They had grossly misconducted themselves as directors of SMI and conducted themselves in a fashion that amounted to recklessness. All of this justified the orders declaring them to be delinquent directors.