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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***Itzikowitz v Absa Bank Ltd* (20729/2014) [2016] ZASCA 43 (31 March 2016).**

The Supreme Court of Appeal (SCA) today handed down judgment relating to whether a shareholder can sue for the diminution in value of shares due to a wrong committed against a company.

The appellant, Mr Itzikowitz, is a sole shareholder in a company (Compass) which in turn holds 17.29 per cent in another company (QPG). QPG was the sole shareholder in yet another company (AMU). Compass is owed over R5 million by AMU through a loan account. The respondent, Absa was the banker for AMU and QPG and had provided loan facilities to AMU which had been increased after June 2010 from R390 million to an amount in excess of R500 million as at 31 August 2011.

On 4 June 2012 AMU's board resolved to voluntarily commence business rescue. On 18 June 2012 Absa obtained an order setting aside the resolution in the Western Cape High Court (WCHC) and on 29 June 2012, Absa obtained an order placing AMU under provisional liquidation on the basis that AMU was hopelessly insolvent. The provisional order was made final by the WCHC on 14 August 2012.

Then, on 30 August 2012, Absa sued Itzikowitz out of the South Gauteng High Court (SGHC) for the payment of R20 million on the basis of a suretyship he had signed on 9 January 2008 in terms of which he bound himself as surety and co-principal debtor jointly and severally liable with AMU in favour of Absa in the amount to R20 million. Itzikowitz filed a plea and two counterclaims which are the subject of the appeal to the SCA.

In his counterclaims, Itzikowitz alleged that AMU's demise was a result of intentional, reckless or negligent conduct by Absa in that it, among other things: advanced funds to AMU when there was no reasonable prospect of the monies being repaid; ignoring his written request in September 2011 to cease advancing funds to AMU; and setting aside the attempted business rescue and then applying for AMU's winding-up. As a result of AMU being wound up, Itzikowitz alleged that: the value of QPG's shareholding in AMU had reduced to nil; trading in QPG shares was suspended by the Johannesburg Stock Exchange; the value of Compass' shareholding in QPG was reduced to nil; and Compass' loan to AMU amounting to over R5 million was rendered irrecoverable. By way of his counterclaims Itzikowitz sought to recover from Absa the amount of the reduction in value of his shareholding in Compass, which he alleged to be R50 002 338.

In counterclaim A, founded in delict, Itzikowitz alleged that: Absa knew that he stood surety for AMU and that he had an indirect financial interest in QPG and AMU; Absa knew and foresaw that a winding-up of AMU would materially impact on the value of QPG shares in AMU, Compass' shares in QPG and the value of his shares in Compass. He alleged that Absa owed him a legal duty to conduct itself toward AMU as a reasonable banker by not taking any adverse decisions towards AMU's business and share value. In counterclaim B, Itzikowitz pleaded the same allegations in the alternative, but relying on s 218(2) read with s 22 of the Companies Act 71 of 2008. He alleged that he could on this basis also recover the value of the devaluation directly from Absa.

The SGHC: (a) upheld the exception against counterclaim A ruling that it did not disclose a cause of action against Absa because the legal duty relied upon was nonexistent; in respect of counterclaim B, the SGHC (b) dismissed the exception ruling counterclaim B to be valid and that it was allowed to proceed to trial for proof of the averment made in its respect. It was to the order under (a) that Itzikowitz appealed, whilst Absa cross-appealed in respect of the order under (b).

As to Itzikowitz's appeal in relation to (a), the SCA held it was a delictual claim for pure economic loss which was not prima facie wrongful. The SCA accepted Absa's argument that Itzikowitz being no more than a shareholder three times removed from AMU, could not sue to recover its loss as he had not been wronged by Absa. The SCA held in this regard that the fundamental company law principle that a company is a separate entity had to be kept in mind. The SCA also held in the light of such principle that Itzikowitz's personal claim for the diminished value of his shares in AMU was misconceived. The SCA found that it could hardly be open to Itzikowitz, a shareholder thrice removed from AMU to contend that Absa, AMU's major creditor, was legally not entitled to have applied to court to liquidate the company.

The SCA further held that a claimant in the position of Itzikowitz could only recover damages, firstly where he could establish that the wrongdoer's conduct constituted a breach of a legal duty owed to him personally. Secondly, where on an assessment of the facts, a court is satisfied that the breach of duty caused the claimant personal loss that is distinct from that of the company as a separate corporate entity. The SCA according held that Itzikowitz's appeal had to fail with costs.

And as to Absa's appeal in relation to (b), the SCA held that the dismissal of an exception is not appealable. The court held that it is trite that the dismissal of an exception (save an exception to the jurisdiction of the court) does not finally dispose of the issue and is thus not appealable.

The SCA further rejected Absa's argument that the court had jurisdiction to entertain its cross-appeal. It held that there is no distinction between appeals and cross-appeals as a cross-appeal is merely an appeal that is conveniently tacked on to another appeal, thus that in general, the rules applicable to appeals also apply to cross-appeals.

The SCA accordingly ordered, except for allowing Itzikowitz 15 days to deliver a notice to amend counterclaim A if he is so advised, that Itzikowitz's appeal is dismissed and that Absa's cross-appeal is struck from the roll, and in each these instances with costs.

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