Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 30 May 2017

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.

AON South Africa (Pty) Ltd v Van den Heever NO

The SCA today upheld an appeal by AON South Africa (Pty) Ltd against a decision by the Gauteng Local Division, Johannesburg dismissing a special plea. The litigation flowed from the collapse and liquidation of New Protector Holdings (Pty) Ltd (New Protector), which had bought the business of Protector Group Holdings (Pty) Ltd (Protector) with the assistance of a loan from the IDC. The loan had been used by New Protector to pay the purchase price of the business of Protector. In turn Protector used R50 million of the money lent to it to pay Glenrand MIB Financial Services (Pty) Ltd (Financial Services) for its 65 % stake in Protector. Financial Services was a wholly owned subsidiary of Glenrand MIB Ltd (Glenrand). AON's involvement arose because it purchased Glenrand's business after the events giving rise to the litigation.

In previous litigation brought by the liquidators of Protector against Glenrand, Financial Services and two directors of both companies, the SCA had held that there was no dishonesty involved in the underlying transactions and that all parties to the transaction, including the IDS, were aware of the use to which the funds lent by the

IDC were to be put. It upheld an enrichment claim by Protector against Financial Services on the basis that the contract under which Financial services had sold its interest in Protector was invalid. On the basis of this claim the liquidators of Protector sought and obtained the liquidation of Financial Services and commenced the present litigation against AON.

The claims advanced against AON sought to recover the sum of R50 million paid to Financial Services that had been the subject of the previous litigation. This amount had been used by Financial Services to discharge a loan given to it by Glenrand when it acquired the stake in Protector and to pay a dividend to Glenrand. The claims were based on allegations that the discharge of this debt and the payment of the dividend were undue preferences in terms of the Insolvency Act in that they had been paid when Glenrand was aware that Financial Services was not entitled to be paid the R50 million and in contemplation of Financial services liquidation, with the intention of preferring Glenrand over Protector. Alternatively it was alleged that the dividend was paid as part of a collusive scheme to prefer Glenrand over Protector.

The SCA upheld the special plea of *res judicata* on the basis that these contentions had been fully explored in the previous case and the factual findings made by the court were inconsistent with them. It is a principle of law that there must be finality to litigation and where the same issue has been determined in litigation between the same parties, or persons with whom they have an identity of interest, those issues may not be reopened in subsequent litigation. Here the issues were the same, the subject matter of the claim – the sum of R50 million – was the same and there was a complete identity of interest between the parties. Accordingly the special plea of *res judicata* was upheld.