**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

**Date:** **19 May 2022**

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Nedbank Limited v Houtbosplaas (Pty) Ltd and Another* (Case no 164/2021) [2022] ZASCA 69 (19 May 2022)

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Today the Supreme Court of Appeal (SCA) dismissed the appellant's appeal with costs

The appeal was about two companies, namely Houtbosplaas (Pty) Ltd (Houtbosplaas) and TBS Alpha Beleggings (Pty) Ltd (TBS Alpha) suing their erstwhile Bank, Nedbank Limited (Nedbank), for damages (ie *mora* interest) for failing to give immediate effect to their instructions. The gravamen of the complaint by Houtbosplaas and TBS Alpha was that Nedbank had refused to close their bank accounts pursuant to their written instructions of 20 January 2017 to Nedbank to do so upon termination of the parties' customer and banker contractual relationship.

The appeal concerned, primarily, the right of a customer of a bank to summarily terminate its customer and banker contractual relationship and close the customer's account. Allied to the primary issue was the question whether Houtbosplaas and TBS Alpha had a right of recourse against Nedbank for *mora* interest as a consequence of Nedbank's failure to pay over the funds held in their account to a nominated Bank within a reasonable time of having been requested to do so.

Both parties had opposing views as to the trusts' shareholding in the two companies and this resulted in an impasse. On 20 January 2017, the companies' representative, acting on behalf of the companies, gave written notice to Nedbank to close the companies' bank accounts and transfer all funds held in those accounts to ABSA Bank to be credited to various accounts, details of which were provided.

The high court granted the relief sought by Houtbosplaas and TBS Alpha as prayed in their notice of motion. In short, the high court found in favour of Houtbosplaas and TBS Alpha on two bases. First, it held that each one of the four trusts did not exercise 25% of the voting rights at general meetings of the companies, namely Houtbosplaas and TBS Alpha. Second, it concluded that clients of a bank were under no statutory obligation under the Financial Intelligence Centre Act 38 of 2001 (FICA) to provide documents to a bank for verification purposes upon request to do so by such bank. Thereafter, the high court refused Nedbank's application for leave to appeal which was subsequently granted by this Court on petition to it.

In this Court counsel for Nedbank submitted that the high court erred in its conclusion because it overlooked a cardinal fact, namely that in terms of the memoranda of incorporation of the companies concerned preference shareholders were not eligible to vote in relation to certain matters at general meetings of the companies. Bearing this consideration in mind, it was argued that, with respect to those matters the four trusts would each exercise 25% of the voting rights. Therefore, Nedbank was entitled to copies of the trust deeds of the four trusts in line

with FICA's requirements. Insofar as the high court's second finding was concerned, counsel contended that the high court had regard to the amended version of s 21(2) of FICA that was not of application, ignoring the pre-amended version that was in operation at the relevant time.

Nedbank argued that for as long as the companies' representative refused to provide a copy of one of the trust deeds it was duty-bound not to give effect to the instruction to close the accounts and transfer the balances held in those accounts to ABSA Bank. Had it closed the accounts and transferred the balances to ABSA Bank, Nedbank argued, the manifest purpose and objects of FICA – which are, inter alia, to identify the proceeds of unlawful activities, combat money laundering and financing of terrorist and related activities – would, as a result, have been undermined.

In relation to the contentions advanced by counsel for Nedbank as to the import of article 2.1 of the two companies' memoranda of incorporation the SCA considered it necessary to ascertain the correct construction of the provisions of this article. The SCA stated that the logical point of departure in construing a document was the language of the document itself, interpreted in the light of its context and purpose which was a unitary exercise. Bearing those principles of interpretation in mind, the SCA turned to consider the question whether each one of the four trusts exercised 25% of the voting rights in circumstances where the preference shareholders were precluded from voting by virtue of article 2.1 of the memoranda of incorporation of Houtbosplaas and TBS Alpha.

The SCA found that preference shareholders were precluded from exercising their voting rights only in relation to matters concerning the assets or profits of the companies that would benefit them either financially or materially. Other than that, their voting rights were untrammelled. Concerning s 21(2) of FICA before its amendment, the SCA held that it applied to Bank customers who already had existing accounts with a Bank when FICA took effect on 1 February 2002 and thus did not avail Nedbank. Similarly, regulation 7(*f*)(ii) was not of application for the same reason as s21(2) of FICA.

Insofar as the claims of Houtbosplaas and TBS Alpha for *mora* interest in the various sums claimed by them in this litigation were concerned, the SCA held that it was by now recognised without question that a party who had been deprived of the use of his or her capital for a period of time has suffered a loss and did not need to establish special proof of his or her damages. It found that the sole question to be decided insofar as the respondents' claim for *mora* interest was concerned was whether there was any lawful justification for Nedbank to restrict the accounts for the reasons upon which Nedbank relied. The SCA held that both Houtbosplaas and TBS Alpha were rightfully entitled to judgment in the amounts claimed representing *mora* interest calculated from 20 January 2017 (ie the date of demand), to 10 July 2017 (ie the date on which effect was given to their instruction to close the accounts and pay over the various funds held in those accounts to ABSA Bank).

The SCA held that there was no basis for concluding that Nedbank was justified in refusing to give effect to its erstwhile clients' instructions to close the relevant bank accounts. In so doing Nedbank acted in breach of its obligations. That being so, the SCA dismissed the appeal with costs.

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