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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Enforced Investment (Pty) Ltd and Others v Verifika Incorporated and Another (599/2021) [2023] ZASCA 5 (25 January 2023)

Today, the Supreme Court of Appeal (SCA) handed down judgment upholding an appeal against the decision of the Gauteng Division of the High Court, Johannesburg (the high court). In the same judgment, the SCA dismissed the appeal against the decision of the high court under case no 14799/2020.

In respect of the appeal against the decision under 6183/2020, the issue before the SCA was whether the first appellant, Enforced Investments (Pty) Ltd (Enforced), was required to state, in the breach notices, the consequences of a failure on the part of the respondents, Verifika Incorporated (Verifika), and Mr Laferla, to perform timeously. The appeal against the decision under case number 14799/2020 concerned the costs order that followed upon the dismissal of the appellants' counter-application for the winding-up of Verifika.

The second appellant, Ms Torres, was formerly the sole shareholder of Verifika. On 18 March 2016, Ms Torres sold 50% of her shareholding in Verifika to the second respondent, Mr Laferla. Mr Laferla was then appointed as director of Verifika and although Ms Torres resigned as a director of Verifika, she remained a signatory on its bank accounts. On 6 June 2019, Ms Torres sold the remaining 50% of her shares in Verifika to Mr Laferla for the sum of R2 million. Mr Laferla paid a deposit of R100 000. On the same date, Enforced, represented by the third appellant, Mr Woodnutt, lent and advanced an amount of R1.9 million to Verifika. The purpose of the loan was to enable Verifika to expand its business operations. It is common cause, however, that Mr Laferla misappropriated the R1.9 million, which he used to pay Ms Torres for her shareholding in Verifika. She was however not aware of this when the payment was made to her. As security for the loan, Mr Laferla ceded his shareholding in Verifika to Enforced.

By 30 June 2019, interest in the amount of R14 054.79 was due and payable by Mr Laferla to Enforced in terms of the loan agreement. This amount had escalated to R32 343.19 by 31 July 2019 and led to the first letter of demand on 8 August 2019. On that date, Mr Woodnutt, on behalf of Enforced, personally delivered by hand to Verifika's chosen *domicilium citandi et executandi* a letter demanding payment thereof. Enforced made further written demands, on 18 October 2019 and 24 January 2020

respectively, claiming payment of the arrear interest. On 28 January 2020, Enforced called up its security by entering Ms Torres' name in Verifika's securities register and she was appointed a director of Verifika. On 31 January 2020, Enforced sent a letter of demand to Verifika claiming payment of the full amount due in terms of the loan agreement. Mr Laferla made his first payment of arrear interest on 24 February 2020.

In the high court, the respondents contended that the breach notices were defective as it did not properly inform them of what is required in order to avoid the consequences of default. They also submitted that the notices were not clear and unequivocal of the consequences of a failure on their part to perform timeously. Their argument followed that if cancellation was intended, it ought to have been expressed in the notice.

In respect of case number 6183/2020, the SCA held that once there was an event of default, there was no duty on Enforced to notify Verifika that it intends to call up the security as one of the options available to it. Importantly, what Enforced conveyed was not an intention to enforce a *lex commissoria*, but an indication that there was a breach of payment and a demand for payment of the arrears. Three business days after this written demand, without the breach having been remedied, an event of default occurred. Accordingly, Enforced became entitled to accelerate payment of all amounts owing and to call up the security in terms of clause 11.2 of the loan agreement.

In respect of the costs of the counter-application under case number 14799/2020, the high court found that the application for Verifika's winding up was fatally defective on the basis that no valid certificate of security in terms of s 346(3) of the Companies Act 61 of 1973 had been filed. The SCA held that this finding was correct.

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