



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
Date: 30 November 2012
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.

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SENWES LIMITED V MICHAEL FRANCOIS VAN DER MERWE

The SCA today upheld an appeal against the judgment of the full court of the North Gauteng High Court (Pretoria) which upheld an appeal by the respondent. This appeal is with special leave of this court.

Senwes Ltd sued the respondent for the payment of R9 172 394.69 being for damages suffered. Senwes had concluded a sale agreement between itself and the respondent whereby Senwes sold and the respondent purchased the right to claim against the insolvent estate of MJP Boerdery Close Corporation of which the respondent was the sole member. The first installment was due and payable on 31 December 2002 in terms of clause 2 of the sale agreement. It is common cause that the respondent failed to pay the first installment which entitled Senwes to claim for damages.

The nub of this case is the interpretation of clause 6.1 of the sale agreement and also whether the provisions of sections 83 and 84 of the Insolvency Act 24 of 1936 (the Act) invalidated the agreement. It was the respondent's main defence that the agreement was invalid as it conflicted with sections 83 and 84 of the Act.

Clause 6.1 provides that the agreement will be considered cancelled, as if the claim against the CC was never sold or purchased by the respondent, in the event of the respondent failing to effect payment of the first installment on 31 December 2002. However the agreement also contained clause 5 and 9 of the sale agreement which respectively provide that should the respondent fail to effect payment of any installment before the stipulated date, the full outstanding amount shall be due and payable and clause 9 provides that the innocent party shall give the guilty party 14 days' notice to make good the default, failing which the innocent party shall be entitled to cancel the agreement and enforce his right in terms of the agreement or under common law.

The question is whether clause 6.1 prohibits Senwes from exercising his right in terms of clause 5 and 9 of the sale agreement.

This court found that Senwes does not forfeit its right in terms of clause 5 and 9 of the sale agreement. This court also found that section 83 and 84 of the Act were irrelevant and not applicable because the merx of the sale was the claim and not the property mentioned in clause 3 of the sale agreement.