



DISPUTES

The Banks Win on Appeal: SCA Overturns R704 Million High Court Judgment

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In the decision of *African Banking Corporation of Zambia Limited and Others v Mapula Solutions (Pty) Ltd*^[1], the Supreme Court of Appeal (**SCA**) was required to determine whether the Gauteng Division of the High Court, Johannesburg, (**High Court**) erred in concluding that: (a) African Banking Corporation of Zambia Limited (**ABC Zambia**), African Banking Corporation of Botswana Limited (**ABC Botswana**), Standard Chartered Bank Limited – Johannesburg Branch (**SCB Johannesburg**), and Standard Chartered Bank of Botswana (**SCB Botswana**) (collectively, **the Banks**) breached the terms of a Debt Rescheduling Agreement (**DRA**) concluded with Blue Financial Services Limited (**Blue**) and Mayibuye Group Proprietary Limited (**Mayibuye**), (b) the Banks' conduct caused Mayibuye to suffer a loss, (c) the Banks acted in common purpose, and (d) the Banks should be held jointly and severally liable to Mapula Solutions Proprietary Limited (**Mapula**).

Factual Background

Blue was formerly listed on the Johannesburg Stock Exchange (**JSE**) and had various subsidiaries which were involved in the business of micro-lending across 12 countries. Blue and its subsidiaries (collectively, **the Blue Group**) became financially distressed following alleged mismanagement and fraud committed by the CEO of Blue. With the hope of rescuing the company, Blue solicited bids from companies to assist with restoring its profitability. Mayibuye viewed this invitation as an investment opportunity and successfully submitted a bid to assist with the recapitalization of Blue.

As part of the recapitalization, Mayibuye subscribed for shares in Blue by making payment of an amount of R163 million. Mayibuye, Blue and the Banks (which were some of Blue's creditors) concluded the DRA in terms of which the Banks agreed to receive payment only in respect of interest and Blue's capital repayments to the Banks were deferred for a period of three years (**Rescheduling Period**). In terms of the DRA, Blue was required to collect on its loans and, within ten days of the end of the Rescheduling Period, submit a distribution plan to the Banks detailing the amounts it collected and how such amounts were to be divided among the Banks. If the amounts collected were insufficient to pay all of Blue's outstanding debts, the Banks were afforded two options. The Banks could either convert their debt into equity or grant Blue an additional 24-month period to collect on its loans following which Blue was required to make payment of the collected amounts in full and final settlement of the debts owed to the Banks. If the amount collected after the 24-month period was still insufficient, the Banks were required to write-off Blue's debt.

The Rescheduling Period was intended to end on 31 December 2013. However, Blue defaulted on interest payments, resulting in the end date of the Rescheduling Period being 6 September 2013. Blue was therefore required to submit its distribution plan within ten business days from 6 September 2013. Blue failed to do so timeously and instead, it submitted a distribution plan on 13 December 2013 which the Banks (through a committee established in terms of the DRA) objected to due to its non-compliance with the DRA.

As a result of Blue's non-compliance with the DRA, each of the Banks initiated separate legal processes in various jurisdictions against Blue to recover the amounts owed to it by entities within the Blue Group. Mayibuye claimed that the actions taken by the Banks (i.e. to recover the debts owing by entities within the Blue Group) had breached the DRA and as a result, the recapitalization failed. Consequently, Mayibuye claimed that it suffered a loss of R704 968 234 which amount represented the value of its investment in Blue as at 1 November 2013 or R163 million being the amount which it invested in Blue. Mayibuye ceded this claim to Mapula who successfully sued the Banks in the High Court. The Banks appealed the decision of the High Court to the SCA.

SCA Appeal

The SCA found that the Banks did not act with a common purpose and therefore the finding of joint and several liability was unjustified. In arriving at this conclusion, the SCA took note of the fact that each of the Banks took separate steps and engaged different legal representatives to recover the amounts owed to it by Blue. By way of example, ABC Zambia sent a letter to Blue requiring payment of the original loan on 1 November 2013 (the date on which Mapula alleges the loss occurred). No other bank took such a step on that date which means that the loss had already occurred by the time when ABC Botswana, SCB Johannesburg and SCB Botswana were alleged to have breached the DRA. Furthermore, the SCA found that the High Court erred in analysing the Banks joint and several liability in the context of liability for costs and applying that finding to the Banks' liability for the loss suffered by Mapula without examining each alleged breach and its consequence to apportion liability.

Secondly, the SCA found that Mapula did not prove any breaches of the DRA by the Banks. Blue did not submit a valid distribution plan within ten days of the end of the Rescheduling Period therefore the obligation for the Banks to make an election in terms of the DRA to convert their debt to equity or to be non-capitalizing lenders was not triggered. The SCA held that Blue's failure to deliver a compliant distribution plan was fatal to Mapula's case because as the party whose claim is based on the DRA, it is required to prove its compliance with the DRA. Further, Blue's failure to comply with the provisions of the DRA entitled the Banks to enforce compliance with DRA which includes realising the security enjoyed under the DRA. The SCA held further that the Banks enforcing their rights under the DRA cannot, at the same time, also constitute a breach of the provisions of the DRA.

Lastly, the SCA held that Mapula did not establish any causation between the conduct of the Banks and the loss suffered by Mapula. Mapula alleged that Blue's shares were devalued as of 1 November 2013. However, only ABC Zambia requested payment on that date. Mapula claimed that Mayibuye's investment was devalued when it instituted proceedings in 2016 and yet Mayibuye continued with its attempts to recapitalise Blue up until 2018. It was unclear to the SCA how the letter of demand from ABC Zambia could destroy Blue's value in light of several other factors which include fraud on the part of Blue's former CEO and Blue's inability to produce audited financial statements. Furthermore, the letter of demand had no effect on Mayibuye's efforts to reinstate Blue's listing on the JSE, nor Blue's failure to produce audited group financial statements. According to the SCA, the High Court overlooked these factors and attributed Blue's demise to a letter of demand instead of the various unsuccessful attempts to recapitalise Blue. The SCA held that the High Court's finding that the Banks' conduct destroyed Blue's share price is unsustainable and the High Court should have dismissed the action.

Concluding Remarks

The SCA held that none of the High Court's findings were supported by evidence and the High Court's failure to analyse whether the alleged breaches by the Banks resulted in adverse consequences for the Mayibuye investment on 1 November 2013 undermined the soundness of its judgment. As a result the Banks' appeal to the SCA succeeded.



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