



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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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.

VENFIN INVESTMENTS V KZN RESINS

The Supreme Court of Appeal (SCA) today partly upheld an appeal by Venfin Investments (Venfin) against an order of the KwaZulu-Natal High Court, Durban and dismissed a cross-appeal by KZN Resins (KZN).

Fibalogic (Pty) Ltd, a manufacturer of geysers, had instituted action against KZN for an amount of R26 million for its loss resulting from a marked increase in the defective geysers returned to it. It attributed this increased rate of returns to the use of KZN's resin in the manufacturing process. Fibalogic alleged that KZN had agreed to compensate it for damages it had suffered. Fibalogic subsequently ceded its claim against KZN to Venfin and as part of the cession agreement, Venfin indemnified Fibalogic against any claim by KZN for goods sold and delivered to Fibalogic. Venfin was formally substituted as plaintiff in the ongoing proceedings after Fibalogic was placed under liquidation. KZN had instituted a counterclaim against Fibalogic for about R2 million which it alleged was the balance of the

purchase price of resin sold and delivered to Fibalogic. It counterclaimed this amount from Venfin after the latter was substituted as plaintiff in the proceedings. The counterclaim was founded, in the main, on the provisions of section 156 of the Insolvency Act 24 of 1936. In the alternative, the counterclaim relied on the provisions of the cession agreement entered into between Fibalogic and Venfin.

The high court dismissed Venfin's claim against KZN. It also dismissed KZN's counterclaim based on section 156 of the Insolvency Act with costs, hence the cross-appeal. However, the high court upheld the counterclaim based on the provisions of the cession agreement between Fibalogic and Venfin.

The SCA dismissed Venfin's appeal against the order dismissing its claim against KZN. It endorsed the high court's finding that Venfin had failed to establish the compensation agreement upon which it relied for its claim. However, the SCA upheld Venfin's appeal against the order upholding the counterclaim based on the provisions of the cession agreement. It held in this respect that Fibalogic's obligations to KZN could only have passed to Venfin by way of assignment, which would require a tripartite agreement between the cedor (KZN), the debtor (Fibalogic) and the assignee (Venfin). No agreement had either been pleaded or established by KZN. It followed, the SCA held, that the high court had erred in allowing the counterclaim on the basis that it did. In dismissing the cross-appeal, the SCA held that section 156 applies only to the liability of an insurer— properly so called— to a third party under a policy of indemnity insurance. The undertaking by Venfin to indemnify Fibalogic in the event of a claim by KZN, the SCA held, was not intended for the benefit of KZN but solely for the benefit of Fibalogic, ie KZN was not a third party under a policy of indemnity insurance . Consequently, the SCA held that the high court was right in dismissing KZN's counterclaim based on section 156 and by ordering it to pay the costs resulting from this issue.