



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: 20 March 2013
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.

CAPE EMPOWERMENT TRUST LIMITED v FISHER HOFFMAN SITHOLE

The Supreme Court of Appeal (SCA) today held, unanimously, that the respondent - an auditor's firm - could not be held liable for a negligent misstatement which caused the appellant to enter into a written sale of business agreement for the purchase, in the amount of R 137million, of an unprofitable business entity from a third party.

The matter arose in the Cape High Court a result of a written sale of business agreement concluded between Cape Empowerment Trust Limited (CET) and another listed company, Paradigm Interactive Media Ltd (Paradigm), for the purchase of a business from a subsidiary of Paradigm. The written sale agreement included a profit warranty by the seller to the purchaser, as well as a warranty that all accounts receivable were good and collectable to the full amount thereof. As it turned out, however, the debt owed to and lucrative contract purportedly secured by the business purchased was entirely fictitious. In fact the business was in substantial arrears. Furthermore, the sale agreement was concluded

in non-fulfilment of a suspensive condition, the effect of which was to render the contract null and void from the outset. However, having discovered the fraud and the fatal error in the conclusion of the contract, CET chose to reaffirm its contract with Paradigm, claiming that the maze-like structure of agreements in which it had entangled itself (for the purposes of a tax benefit) did not allow it to walk away from the sale at that stage.

Wishing nevertheless to recover its losses, CET brought a delictual claim against Fisher Hoffman Sithole (FHS), the partnership of auditors which issued a profit certificate confirming the fictitious profits of the business purchased. While the SCA found that factual causation for the conclusion of the sale agreement could be attributed to the negligent misstatement contained in the profit certificate, it held that wrongfulness and legal causation had not been established.

On the issue of wrongfulness, the SCA expressly disavowed the finding by the court a quo that the degree of the auditor's negligence was relevant in considering whether or not liability should be imposed for the loss caused by his misstatement. Further, the court held that it would be unreasonable to impose liability on FHS for a loss to which CET had exposed itself, and hence rendered itself vulnerable, by entangling itself in an agreement so complicated that it would not be able to rely on the contractual remedies available to it.

On the issue of legal causation, the court found that CET's act of reaffirming the contract - as opposed to walking away from the fraudulent sale - could not have been foreseen by FHS. This act constituted a *novus actus interveniens*. As a result, legal causation could not be proven and liability for the loss could not attach to FHS's negligent misstatement.

In consequence, the court dismissed the appeal and upheld the cross-appeal against the judgments of the Cape High Court.