

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A5001/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED:

In the appeal of:

SEAN CROWDER BASTOS TUNA

Appellant

PIONEER FOODS (PTY) LIMITED

Respondent

Coram: VAN OOSTEN et WEPENER et MPHAHLELE JJJ

Heard: 16 NOVEMBER 2016

Delivered: 18 NOVEMBER 2016

Summary: Surety – Corporation under supervision for the purposes of business rescue: the provisions of s 133(1) of the Companies Act allowing for a moratorium in respect of payment of debts by a principal debtor, do not extend to a surety.

JUDGMENT

WEPENER J:

[1] This is an appeal against a judgment and order granted by Tshabalala J, leave having been granted by him to appeal to this court.

[2] There is a single issue for determination: the appellant stood surety for a close corporation, KJ Foods CC, the latter which was placed under supervision for purposes of commencing business rescue proceedings after the deed of surety was entered into. Although there is some dispute as to whether a business rescue plan was approved, it does not matter whether the respondent is bound by it as a creditor of the close corporation as a result of the view which I take of the matter.

[3] It was common cause that all creditors of the close corporation in business rescue will be bound by a business plan approved by the court. But the respondent's application for summary judgment against the appellant was not sought on the basis as a creditor of the close corporation. It sought a judgment against the appellant which stood surety for the close corporation.

[4] In terms of a written deed of suretyship the appellant bound himself jointly and severally as guarantor and co-principal debtor for the full amount owed to the respondent and for the proper and punctual payment of all amounts and due discharge of the commitments of the close corporation towards the respondent. The appellant renounced the benefits and legal exceptions that he would otherwise have been able to

rely upon as a defence had he not so renounced it, save that such renunciation is also explicit as a result of the appellant having bound himself as a co-principal debtor.¹

[5] The terms of the deed of suretyship includes the following:

‘Without prejudice to the above, I / we agree thereto that the creditor may, at his own choice and in his own discretion institute legal action to recover the full amount due from me / us without first addressing either the debtor or any other guarantor. . . .’

[6] The respondent issued summons against the appellant as surety and co-principal debtor for the payment of the amount of R12 574 850, being the amount for which the close corporation was indebted to the respondent. The appellant defended the action and the respondent successfully applied for summary judgment. Tshabalala J held that the defence upon which the appellant relied was not available to him in his capacity as surety and co-principal debtor. The defence that was raised was that the moratorium to pay its debts which is available to a corporation pursuant to s 133(1) of the Companies Act,² should also be available to a surety of that corporation. Section 133(1) reads as follows:

‘1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c)’

[7] When considering the effect of s 133(1) on the rights of a creditor vis-à-vis a surety, and not the corporation, Kathree-Setiloane J said in *African Banking*³ that the moratorium provided for in s 133 is directed exclusively at protecting the interests of the

¹ Para 12 below.

² Act 71 of 2008.

³ *African Banking of Botswana v Kariba Furniture Manufacturers* 2013 (6) SA 471 (GNP) paras 65-71.

company under business rescue and that the indebtedness of the surety is not affected thereby. The learned Judge said:

[65] In terms of the arbitration awards and his suretyship, Baldwin Nchite is liable jointly and severally with the company for the payment of the company's indebtedness to the Bank. Under the arbitration appeal award, Birgitta Nchite's liability to the Bank under her suretyship was discharged. The company and the Nchites have launched an application in terms of which they seek to have the arbitration awards set aside. If they succeed in doing so, the full extent of the Bank's claim as formulated in its original particulars of claim will revive, and the Bank's claim against the Nchites will be based on their respective suretyships.

[66] In terms of the suretyships, the Nchites are sureties and co-principal debtors for the payment of all sums of money owing by the company to the Bank. The suretyships specifically provide that the Bank's claim against the Nchites will not, in any way, be affected by any compromise of the Bank's claim against the principal debtor (the company), whether this is caused by 'insolvency, judicial management or liquidation, as the case may be'.

[67] The Bank maintains that the fact that the company was placed under business rescue cannot deprive it of its right to pursue the sureties under the suretyships. Jordaan and the Nchites, no doubt, have expressed the contrary view. At the second meeting of creditors the Nchites' attorney indicated that the binding offer made by his clients was in full and final settlement of the Bank's claim. Jordaan confirmed this at the meeting. In his answering affidavit Baldwin Nchite states that the Bank's claim 'in terms of the sureties stands to be decided upon the agreements themselves, as well as the status of the business rescue proceedings at the time such actions are instituted'. The Bank, accordingly, seeks a declaratory order to the effect that the adoption of a business rescue plan, in respect of a company placed under business rescue, will not affect the rights which a creditor has under suretyships executed in favour of the creditor for the payment of amounts owed by the company placed under business rescue.

[68] There is no express provision contained in ch 6 of the Act which provides that the adoption of a business rescue plan will deprive creditors of the company in business rescue of their rights as against sureties for the debts of the company in business rescue. The effect of such a provision, in my view, would be drastic, as it would deprive a creditor

of its rights as against a third party (surety) simply by virtue of the adoption of a business rescue plan for the debtor. If the legislature intended that the adoption of a business rescue plan would have such a far-reaching consequence, the legislature would have expressly provided for this consequence.

[69] There is, furthermore, no basis to suggest that such a provision could be read into the business rescue regime. As already explained, the express purpose of business rescue is to 'provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders'. The emphasis of the business rescue regime is therefore on the company in financial distress, and the relevant stakeholders. There need be no connection between a surety and either the company in financial distress or the stakeholders, and whether or not a creditor is entitled to pursue a surety will, in the ordinary course, have no bearing on the prospects of rescuing a company.

[70] I am, therefore, of the view that the interests of sureties do not fall within the scope of the objective of the business rescue regime. This is clear from the provisions of s 133(1) of the Act, which provides that during the course of business rescue proceedings no legal proceedings, including enforcement action against the company, or in relation to any property belonging to it or in its possession, may be commenced or proceeded with, except under certain circumstances. Section 133(2) provides that during business rescue proceedings, a surety by a company in favour of any other person may not be enforced by any person against the company, except with the leave of the court. In *Investec Bank Ltd v Bruyns* the question for determination was whether s 133(2) of the Act should be interpreted as providing that during business rescue proceedings a suretyship given by A in favour of B for the indebtedness of the company may not be enforced by B against A without the court's leave. Rogers AJ (as he then was) held that the section explicitly referred to the stay of a suretyship undertaken by the company, and not to a suretyship undertaken by a third person for the indebtedness of the company. He also held that the statutory moratorium in s 133(1) on claims against the company under business rescue was a defence purely personal to the principal debtor, namely the company, and could not be raised by the surety. It follows that the statutory moratorium in s 133 of the Act does not have the effect of suspending the indebtedness of any surety to the company placed under business rescue.

[71] Thus, the moratorium provided for in s 133 is directed exclusively at protecting the interests of the company in business rescue. By parity of reasoning, if the legislation does not suspend the indebtedness of a surety pending the outcome of the business rescue proceedings, it is difficult to see how it could deprive entirely a creditor of its rights against a surety. In the circumstances, it is clear that the adoption of the plan will not affect the Bank's claim against Baldwin Nchite as surety for the debts of the company.'

[8] Dealing with this issue Rodgers AJ said in *Investec Bank v Bruyns*:⁴

'[17] The question whether the defendant as surety can raise as a defence the statutory moratorium in favour of GDI and WC (ie the moratorium in terms of s 133(1), which precludes the plaintiff from enforcing the claims in question against GDI and WC as principal debtors) depends on the well-known distinction between defences in rem and defences in personam: 26 LAWSA (first reissue) para 201; and *Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and Another* 1984 (2) SA 693 (C). A defence which is purely personal to the principal debtor may not be raised by the surety. Examples of defences which are purely personal to the principal debtor include restrictions on the enforcement of claims against parties under sequestration or liquidation (see the *SA Fire Equipment* case at 695F – 696F). In *Worthington v Wilson* 1918 TPD 104 the court held that where the principal debtor had the benefit of a statutory moratorium in favour of soldiers on active service the moratorium was a defence in personam which did not avail the surety. The judgment of Gregorowski J in *Worthington* contains a discussion of the old authorities, including the procedure which obtained in Holland whereby a distressed debtor could obtain from the court a moratorium on the enforcement of claims by way of letters of inductie or atterminatie. Voet and Van Leeuwen were agreed that in such a case a surety for the distressed debtor could not resist the creditor's claim on the basis of the moratorium granted to the principal debtor.

[18] In my view the statutory moratorium in favour of a company that is undergoing business rescue proceedings is a defence in personam. It is a personal privilege or benefit in favour of the company. As was stated in the *SA Fire* case (at 696E – F) the essence of a defence in rem is that the defence attaches to the claim itself in the sense that the defence (if upheld) shows that the claim against the principal debtor is invalid or has been extinguished or discharged. A defence in personam, by contrast, arises from a personal

⁴ 2012 (5) SA 430 (WCC) paras 17-19.

immunity of the debtor in respect of an otherwise valid and existing obligation. Clearly the moratorium afforded by s 133(1) falls into the latter class. The obligations of the company as principal debtor are not extinguished or discharged and their validity is in no way impaired. Indeed, with the consent of the business rescue practitioner or the court the obligations may be enforced.

[19] I thus conclude that the statutory moratorium in favour of GDI and WC does not avail the defendant.'

[9] The view of Kathree-Setiloane J in para 68 of her judgment that the legislature would have expressly provided for a moratorium to operate in favour of a surety was set out thus by Rodgers AJ:⁵

'If the lawmaker had intended to prohibit creditors from enforcing their claims against sureties of companies undergoing business rescue proceedings it would have said so. Such a prohibition would be a drastic interference with the rights of creditors and would require clear language.'

[10] In *Business Partners v Tsakiroglou*⁶ La Grange J likewise concluded that the suretyship liability to the creditor had nothing to do with the moratorium imposed by s 133 of the Act.

[11] That a personal defence does not avail a surety was also held in *Linden Duplex (Pty) Ltd v Harrowsmith*.⁷ In personam defences unavailable to the surety include insolvency or liquidation of the principal debtor⁸ statutory composition with creditors, exemption from execution or legal moratorium whether by statute or order of court⁹. This view is in accordance with the learning of Voet:¹⁰

⁵ At para 23.

⁶ 2016 (4) SA 390 (WCC) para 22.

⁷ 1978 (1) SA 371 (W) at 373B-D.

⁸ *Norex Industrial Properties (Pty) Ltd v Monarch South Africa Insurance Co Limited* 1987 (1) SA 827 (A).

⁹ *Worthington v Wilson* at 106; *Skelton v Shelvoke and Smith* 1904 (21) SC 664 at 666.

¹⁰ Voet 46.1.39 – Gane's Translation. For a general discussion on the consequences of a statutory moratorium see JJ Henning: 'n oorsig van die aard en ontwikkeling en invloed van statutêre moratoria in Suid – Afrika gedurende die eerste helfte van die 20ste eeu: Litnet Akademies Jaargang 9(3) Desember 2012.

‘Nevertheless suretyship does not disappear if the goods of the debtor have been confiscated, or have been transferred to his creditors by the benefit of surrender, or if a written order for a stay of payments has been obtained by the debtor.’

According to Voet¹¹ the

‘. . . benefit of surrender is so personal that it in no way assists the sureties of him who surrenders is obvious from the principles of law and from natural reason. One who puts others under obligation to himself on behalf of a debtor looks forward especially to this, that when the debtor has slipped back in his resources he can recover what is his from those who he put under obligation on behalf of that debtor.’

[12] When considering the effect of s 133(1) on the rights of a creditor vis-à-vis a surety, and not the corporation, Kathree-Setiloane J held in *African Banking* that the moratorium provided for in s 133 is directed exclusively at protecting the interests of the company in business rescue and that the indebtedness of the surety is not affected thereby.

[13] Wallis JA referred to the judgment of *Investec Bank* with approval in *New Port Finance Company (Pty) Ltd and Another v Nedbank Limited*.¹²

[14] A surety who has assumed liability as surety and co-principal debtor is in the same situation as the principal debtor. In *Union Government v Van der Merwe*,¹³ Wessels JP said:

‘The present case is however stronger for the surety has signed as surety and co-principal debtor. We must give some meaning to the words “co-principal debtor” that the addition of these words operate as a renunciation of the benefits of the surety is clear, but they have a still greater force. The addition of those words shows that the surety intends that his obligation shall be co-equal in extent with that of the principal debtor: or otherwise expressed, that his obligation shall be of the same scope and nature as that of the principal debtor’.

¹¹ Voet 42.3.11 – Gane’s Translation.

¹² 2016 (5) SA 503 (SCA) para 13.

¹³ 1921 TPD 318 at 322.

[15] A surety's liability to pay is triggered by the principal debtor's default and payment of the debt then becomes due. The debt of the close corporation was indeed due and the surety and co-principal debtor's liability to pay therefor arose.

[16] I am of the view that the appellant's reliance on s 133(1) is misplaced. He is a surety and co-principal debtor. The only requirement for his obligation to pay to arise is that the debt must be due – which is not in dispute. Once that fact had been established, the respondent was entitled to call upon the surety to pay.

[17] In my view, summary judgment was correctly granted. Tshabalala J did not grant the respondent its costs on the attorney and client scale as was claimed in the summons and is provided for in the deed of suretyship. There is however, no cross-appeal on this issue. The respondent asked for costs of the appeal to be costs on an attorney and client scale, an order to which it is entitled.

[18] In all the circumstances, the appeal is dismissed with costs, such costs to be on the scale as between attorney and client.

W. L. Wepener

I agree.

F.H.D. Van Oosten

I agree.

S.S. Mphahlele

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