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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

CASE NO.: 205/2018

**Date heard: 22-06-2018
Date delivered: 15-03-2019**

In the matter between:

**Hitachi Construction Machinery
Southern Africa CO (PTY) LTD**

Applicant

And

**Wiets Jacobus Botes
Martin Van Zyl**

**1st Respondent
2nd Respondent**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. On 27 March 2014, the applicant, Hitachi Construction Machinery Southern Africa CO (Pty) LTD and Blue Chip Mining and Drilling (Pty) Ltd (Blue Chip) concluded an agreement (the agreement) in terms of which Blue Chip leased certain mining machinery from the applicant.

2. Pursuant to the agreement, the first and second respondents, Messrs WJ Botes and M Van Zyl, directors of Blue Chip, concluded a deed of suretyship in terms of which they stood as co-sureties and co-principal debtors with Blue Chip for all amounts owing by Blue Chip to the applicant.
3. Blue Chip was placed under business rescue in terms of the provisions of Chapter 6 of the Companies Act, No 71 of 2008, (the Act) on 10 December 2014. Thereafter and on or about 5 February 2015 the applicant lodged a claim with the appointed business rescue practitioners (BRPs) in the amount of R6 526 729, 58 in respect of pre-business rescue debt. This amount was acknowledged and admitted by the BRPs as owing by Blue Chip to the applicant.
4. The applicant alleges that after the commencement of business rescue proceedings, Blue Chip remained in possession and continued to utilise the machinery of the applicant and as such its indebtedness to the applicant continued to accumulate up to about 31 March 2015, when the machinery was returned to the applicant. Accordingly Blue Chip incurred a further debt owing to the applicant in respect of post-commencement finances in the amount of R1 264 154.55
5. Pursuant to the adoption of the business rescue plan, which was approved by the applicant, the BRPs paid two dividends to the applicant in the amounts of R977 954, 98 and R423 135, 37 (totalling R1 404 090, 35) in respect of the pre-business rescue debt, leaving a balance outstanding in terms of the agreement in the amount of R5 125 639, 23.

6. The post-commencement financing claim was settled through payment of R841 775,90 consisting of a credit note issued in the amount of R241 778,90 and a payment by the BRPs in the amount of R600 00,00, leaving a balance of R422 375.65.
7. The applicant now on the strength of the deed of suretyship, claims the balance of the pre-business rescue debt from the respondents in the amount of R5 125 639,23 together with interest thereon, as well as the balance of R422 375, 66 in respect of post-commencement financing together with interest thereon plus the costs of the application.
8. The respondents oppose the application on two main grounds. Firstly it is contended that once the business rescue plan was adopted the applicant lost the right to claim any further amounts from the respondents. Secondly, they place the quantification of the indebtedness in dispute.

The liability of sureties after a business rescue plan has been adopted.

9. In this regard, Mr Hoffman, who appeared for the applicant relied heavily on the Supreme Court of Appeal judgment in *New Port Finance Co (Pty) Ltd and Another v Nedbank Ltd* 2016 (5) SA 503 (SCA), where on a similar set of facts the court held that the adoption of a business rescue plan would not release a surety where the deed of suretyship contained a clause entitling the creditor to accept a dividend in the business rescue and to recover the balance from the surety.

The argument by Mr Theron SC for the respondents, is that upon a reading of the business rescue plan and deed of

suretyship *in casu*, it is clearly distinguishable from the position in *New Port* and that in any event the remarks made by Wallis JA in *New Port* are obiter.

10. It is imperative therefore to examine the relevant portions of these documents.

- 10.1 In the business rescue plan paragraph 7.2.5 thereof applies, which reads as follows:

“The BRPs are of the view that the controlled winding down of the company’s affairs and the successful finalisation of Proceedings will only be achieved upon adoption of this Business Rescue Plan in terms of which the Company will be released from payment of some of its debts.”

(own underlining)

- 10.2 Of significance in the deed of suretyship is the following clause:

“It is agreed and declared that all admissions and acknowledgements of Indebtedness by the Debtor shall be binding on us; that the Creditor shall be at liberty, without affecting the rights of the Creditor hereunder to release securities and to give time to or compound or make any other arrangements with the Debtor or other person or persons, company or companies aforesaid without reference to or approval of us, and that in the event of liquidation, judicial management, insolvency or compromise, no such liquidation, judicial management, insolvency or compromise and no dividend/s or

payment/s which the Creditor may receive from the Debtor or any other person or persons, company or companies, or from us shall prejudice the rights of the Creditor to recover from us to the full extent of this Suretyship any sum which after the receipt of such dividend/s or payment/s may remain owing by the Debtor.”

11. Mr Theron argues thus, that since the implementation of the business rescue plan had released Blue Chip from its debt to the applicant, there is nothing due and owing anymore by Blue Chip to the applicant and the applicant has lost the right to claim any further amounts from Blue Chip. He referred to sec154 of the Act which deals with the discharge of debts and claims and which reads as follows:

“154 (1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.

(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.”

12. The argument continues that since nothing remains owing by the debtor Blue Chip, the deed of suretyship does not assist the applicant since it entitles it only to go after the sureties (respondents) for *“any sum which after the receipt of such dividend/s or payment/s may remain owing by the Debtor.”*
(Own underlining)
13. It is not in dispute that the business rescue plan released Blue Chip from its debt to the applicant, but does this mean that the debt has been extinguished? Sec 154 of the Act has been said in *New Port* to be *“capable of the construction that it deals only with the ability to sue the principal debtor and not with the existence of the debt itself. If that is the case then the liability of the surety would be unaffected by the business rescue, unless the plan itself made specific provision for the situation of sureties.”* (at paragraph 14 thereof)
14. The business rescue plan makes no provision for the position of sureties. Therefore on the construction given to sec 154 in *New Port*, the liability of the sureties is in my view preserved. And while the debt may not be enforceable against Blue Chip, it does not detract from the obligation of the sureties to pay in the circumstances of this case. The argument by Mr Theron that since no amount remains owing by Blue Chip, the respondents are not liable in terms of the deed of suretyship would render the terms of the deed of suretyship nonsensical and militates against the very reason for a creditor obtaining security against the indebtedness of a debtor i.e. to mitigate the risk of the debtor being unable to fulfill its obligations due to *inter alia* business rescue.

15. Paragraph 12 of the *New Port* judgment applies squarely to the situation at hand, wherein Wallis JA held that:

*“Of necessity therefore it had to be argued that the liquidation of Wedgewood and Danger Point had altered the situation. But that only brought clause six into sharper focus. It identified four broad situations when its terms would apply. They were liquidation, judicial management under the Companies Act 61 of 1973, the submission of an offer of compromise by the debtor and the submission of a scheme of arrangement by the debtor. **If any of those events occurred, clause six entitled Nedbank to accept any dividend on account or any alternative securities arising out of that event and ‘to recover from the surety, to the full extent of this suretyship’ any sums remaining owing thereafter. In other words, the fact that in any of those situations the principal debtor would be released in whole or in part from its obligations would not disentitle the bank from recovering the outstanding amount from the sureties.** Neither suggestion by counsel as to ways in which this could be avoided held water. In particular the suggestion that a clause in these terms did not encompass business rescue – an institution that did not exist under that name when the deeds were executed – **was incorrect.***

(Own highlighting)

16. Mr Theron’s argument, that the pronouncements in *New Port* relating to the liability of sureties after a business rescue plan, are obiter, may be so in the sense that the issues in *New Port* were decided on a different ground. It can however not be said that these are only passing remarks, since the SCA had heard full argument on the business rescue point and had found the issues to be of such importance that it was appropriate to state why the business rescue defence would not have availed the appellants in that matter. I would be slow to ignore these findings.

17. That being said, the defence raised by the respondents, that the business rescue plan released them from their indebtedness to the applicant, is unsustainable.

The quantification of the claims

18. In support of the quantum of its claims the applicant has annexed, in respect of the pre-business rescue debt, the claim form submitted to the BRPs. The post-business rescue debt is supported by invoices and payments received by and credits given to the BRPs. In respect of the total of the pre – and post-business debts a certificate issued by the applicant’s auditors Ernst & Young is annexed.

In addition the applicant contends that the acknowledgment and admission of these debts by the BRPs constitute an admission and acknowledgement of the indebtedness by Blue Chip to the applicant which is binding on the respondents. In this regard reference is made to the deed of suretyship which provides that *“all admissions and acknowledgments of indebtedness by the Debtor shall be binding upon us. . .”*

19. The respondents attack the quantification of the claims on three main bases. Firstly, that the document Annexure “C07” is in its own terms not a certificate. Secondly that the BRPs merely perform a statutory function in terms of sec 145(5) of the Act, by including the applicants claim in the schedule of creditors and do not act in any other capacity or on behalf of Blue Chip and therefore an admission by the BRPs of Blue Chip’s indebtedness is not an admission by Blue Chip. Thirdly that the

applicant failed to supply any primary facts to support their post-business rescue claim when challenged to prove the actual hours worked by the machines, and the fact that an invoice was included for a machine which did not form part of the schedule to the agreement between Blue Chip and the applicant.

20. I deal with the powers and functions of the BRPs first since in my view, my finding in this regard is dispositive of the quantification defences. Sec 145 of the Act deals with the participation by creditors in the business rescue proceedings. Sec 145(5) specifically relates to the determination by the BRPs of the independence of a creditor and to the determination, or appraisal and valuation of a concurrent creditor's voting interest. Besides the fact that sec 145 has nothing to do with the disputes herein, these are not the only functions of the BRPs. Chapter 6 of the Act abounds with functions of the BRPs in business rescue proceedings. What is relevant *in casu* is sec 140(1) (a) of the Act which states that:
- “(1) During a company’s business rescue proceedings, the practioner, in addition to any other powers and duties set out in this chapter-*

(a)Has full management control of the company in substitution for its board and pre-existing management.”

21. The BRPs therefore step into the shoes, as it were, of the company in business rescue. They are not merely a postbox for the receipt of claims as seems to be suggested by the respondents. In fact the business rescue plan, at paragraph

3.6 thereof, states that the BRPs assumed management control of the company in conjunction with the board of directors and pre-existing executive management. The claims were reviewed in detail as is obvious from paragraph 5.2 of the Final Report to Creditors dated 2 December 2016. I may just repeat at this stage that the respondents are both directors of Blue Chip as well as members of the executive management and it would be surprising if they did not participate and assist in the verification of the claims submitted by the creditors and which they now dispute.

Mr Hoffman is correct when he argues that the admission and acknowledgment of indebtedness by the BRPs constitute an admission and acknowledgment by Blue Chip which, in terms of the deed of suretyship, is binding on the respondents. This effectively puts an end to the quantification defences.

22. It follows that the applicant is successful in this application and there is no reason why costs should not follow the result.

The following orders are made:

- a) The application succeeds.**
- b) Orders are granted in terms of paragraph 1 and all its sub-paragraphs and paragraph 2 of the Notice of Motion.**

JUDGE

For Applicant:

Adv J M Hoffman
Cliffe Decker Hofmeyer Inc
c/o Duncan & Rothman Attorneys

For Respondents:

Adv E L Theron SC
Louw & Da Silva Attorneys
c/o Engelsman Magabane inc