IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3249/2013

In the matter between:

JAN JOHANNES BLIGNAUT	Applicant
and	
STALCOR (PTY) LTD	First Respondent
TIRADEPROPS 1140 CC t/a TK MANUFACTURERS	Second Respondent
JACOBUS ELISA KRITZINGER N.O.	Third Respondent
SHERIFF OF THE FREE STATE HIGH COURT: BLOEMFONTEIN-WEST	Fourth Respondent
ABSA BANK, BRANDWAG BRANCH	Fifth Respondent

CORAM: L. Le R. POHL, AJ

HEARD ON: 07 November 2013

DELIVERED ON: 14 November 2013

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[1] The applicant in this matter brought an urgent application to stay the sale in execution of immovable property,

constituting his personal residence, which property was put up as security for an indebtedness incurred in his name jointly and severally with that of the second respondent and in favour of first respondent.

[2] The second respondent has placed itself in business rescue and accordingly first respondent pursues the applicant *qua* surety and based on its joint and several liability, *singuli in solidum* in lieu of a consent agreement, which was made an Order of Court. The applicant is also the sole member of the second respondent.

[3] Paragraph 4.1 of the original Notice of Motion reads as follows:

> "4.1 That the order of this Honourable Court dated 11 April 2013 in terms where of the immovable property was declared specially executable be suspended pending finalisation of the business rescue process of the second respondent."

[4] On 14 August 2013 and by agreement between the parties this court made the following order:

> "It is ordered that the application be postponed *sine die*
>
> 1. The sale of the immovable property been Erf 1[…] Bloemfontein, extension 1[…], district Bloemfontein and with physical address at 1[…] R[…] K[…] Street, U[…], Bloemfontein be stayed pending the finalisation of the application.

2. The application be heard as an opposed motion in the normal course, and the time limits applicable to the filing of answering and replying affidavits will apply.

3. The costs of today be costs in the application to be determined at the argument hereof."

[5] The first respondent filed an opposing affidavit, but outside the time limits applicable to the filing of answering affidavits as envisaged by the Uniform Rules of Court. When the matter came before me on 7 November 2013 as an opposed motion, Mr Roux, who appeared for the first respondent, initially moved for condonation for the late filing of the opposing affidavit. Mr Zietsman, who appeared for the applicant, then indicated that if the court is inclined to entertain the condonation application and/or grant the condonation, he would then move for a postponement to enable the applicant to file a replying affidavit to the first respondent's opposing affidavit. Mr Roux then indicated that in such a case he has instructions to withdraw the application for condonation for the late filing of the opposing affidavit and that the court should adjudicate the application purely on the applicant's papers. The matter was then argued on that basis before me and I will accordingly deal with this matter and give judgment on the applicant's papers alone.

[6] It is common cause that the second respondent owes the first respondent the amount of R2 666 482 plus interest and costs.

[7] As part of on-going negotiations to secure payment a consent agreement with effective date 28 September 2012, was agreed, which agreement was then made an order of court without opposition. The parties to this agreement were the present first respondent, the applicant and the second respondent. As such, it is common cause that the applicant (jointly and severally) with second respondent and as surety, owes the first respondent an amount of R2 666 482, plus interest and costs.

[8] It is common cause that the applicant did not comply with the consensual agreement which was made an order of court and made no payments to the first respondent in this regard.

[9] On 22 February 2013 the business rescue procedure in terms of the Companies Act, Act 71 of 2008, in terms of which the second respondent would be placed under business rescue, was initiated. A business rescue practitioner was appointed and at least two meetings were held with the creditors as envisaged by the business rescue procedure in terms of the Companies Act, Act 71of 2008. It is thus common cause that the second respondent is presently under business rescue.

[10] In the meantime the applicant's aforementioned immovable property was attached and declared specially executable. It was due to be sold on 14 August 2013, when the abovementioned urgent application, referred to in paragraph 1, *supra*, was launched.

[11] At one of the meetings held in terms of the business rescue procedure, it was resolved by the majority of creditors with voting interests, that they would each forfeit 75% of their claims against the second respondent and that the remaining 25% of their claims would be paid back to them on a monthly basis. The first respondent's claim in the amount of R2 666 482 was specifically noted at this meeting and was also included in the repayment plan annexed to the applicant's papers. The net result of this was that the first respondent forfeited the amount of R1 199 862,00, being 75% of its claim and that the remaining R666 621,00, to wit 25% of its claim would be paid back to it in monthly instalments of R30 998,58.

[12] It was submitted on behalf of the applicant that since more than 75% of the holders of voting interest in the second respondent, voted in favour of accepting the business rescue plan, the business rescue plan was therefore binding on the first and second respondent. (Compare section 152(4) of the Companies Act, Act 71 of 2008.)

[13] The submission went further in that it was submitted on behalf of the applicant that the acceptance of the business plan amounted to a statutory compromise which was available as a defence *in rem* to the applicant as either surety or co-principal debtor. The basis for this argument is to be found in the wording of section 154 of the Companies Act, Act 71 of 2008, which reads as follows:

"**154 Discharge of debts and claims-**

(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 the 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."(my emphasis)

In the authoritative work, **Henochsberg on the Companies Act, 71 of 2008,** Vol 1, p 531, the learned author states that the effect of Section 154 on a surety **could be** (my emphasis), that the creditor will not be able to claim against the surety due to the fact that the principal debt has been discharged. No authority is however quoted for this contention and no reference is made by the author to the applicability or not of defences in rem and/or defences *in personam*. I find this contention speculative at best.

[14] Mr Zietsman then referred the court to the decision of **<u>Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and Another</u>** 1984 (2) SA 693 (CPD) at page 696C – F:

"The contrast between defences *in rem* and *in personam* thus is that those *in rem* attach to the claim or cause of action or the obligation itself and arise from the invalidity, extinction or

> discharge of the obligation itself, whoever the debtor may be; those *in personam* arise from a personal immunity of the debtor from liability for an otherwise valid and existing civil or natural obligation. In the case of a defence *in personam* the obligation and debt remain in existence - the creditor may prove his claim in the insolvency or liquidation, the creditor may await the end of the moratorium, the minor's obligation remains a natural obligation, but in each case the debtor is personally immune from a claim. In the case of a defence *in rem* the law does not recognise the obligation or debt even as a natural obligation (illegality) or no obligation in fact came into existence or it was vitiated on a ground justifying its termination (mistake, misrepresentation, duress) or the obligation has ceased because it has been discharged or otherwise extinguished (payment, compromise, novation, judgment). It is in this sense that the defences *in rem* are said to adhere to or arise upon the obligation itself, regardless of the person of the debtor."

[15] The pertinent question therefore to be decided by this Court is whether or not this business rescue amounts to a "**statutory** compromise" (my emphasis) within this context and would thus amount to a defence *in rem* within the context eluded to above. If so, then it would be a defence which would be available to the applicant as surety or co-principal debtor *singuli in solidum*. If the business rescue is however, a defence *in personam* which attaches to the second respondent alone, it would not be a defence available to the applicant with the result that the application must fail.

[16] Mr Roux, who appeared for the first respondent, submitted that a compromise in this sense is not a defence *in rem*. He

submitted that it is a defence purely *in personam* in respect of the second respondent. He referred the court to the authorative work of Forsyth and Pretorius, **Caney's The Law of Suretyship in SA**, 6th Edition at page 188:

> "(a) Defences personal to the debtor do not avail the surety. Defences available to the principal debtor are available to the surety. The principal is limited, however, to those defences which go to the root of the debt, and not to such defences as are personal to the debtor, i.e. those defences which are personal privilege granted to the debtor. This is often expressed in the decided cases by saying that the surety can avail himself of the debtor's *in rem* defences but not *in personam* defences….. Thus *in personam* defences include the insolvency or liquidation of the principal debtor, **statutory composition** with creditors, exemption from execution, or legal moratorium." (my emphasis)

[17] Mr Roux furthermore submitted that the moratorium created by the business rescue plan is purely there to protect the company (in this case the second respondent). He furthermore submitted that it is exactly for this reason that the creditors insist inter alia on personal suretyships to protect themselves in event of a corporate entity going into either liquidation and more recently into business rescue.

[18] Mr Roux also referred the court to the definition of business rescue as contained in section 128 of the Companies Act, Act 71 of 2008. He submitted that it is clear from this definition of business rescue that it amounts to a temporary supervision of the company and of the management of its

affairs, thrown out to the company as a lifeline to resuscitate it as it were. He thus furthermore submitted that from this it is furthermore evident that it is a defence *in personam* which attaches to the relevant company under business rescue and the company alone. It does not bring an end to the obligation. I agree with these submissions.

[19] In interpreting section 154 of the Companies Act, I am mindful of the trite legal principle that I should endeavour to establish the true intention of the legislature and that in doing so, the interpretation should be restrictive.

[20] I therefore conclude that the purpose of the whole business rescue scheme is to, *inter alia*, enable a company in financial distress to get back on its "financial feet", as it were. It is thus a temporary measure by the very nature of it, which can only be achieved if it is afforded to the company and the company alone. It could not have been the intention of the legislature with the enactment of Section 154 of Act 71 of 2008, to include sureties and co-principal debtors as beneficiaries within the scheme of business rescue provided for in the Companies Act, Act 71 of 2008. It therefore does not include any sureties and/or co-principal debtors' *singuli in solidum* like the applicant within the context of the factual matrix of this case.

[21] In the premises, I make the following orders:

21.1 the application is dismissed with costs; and

21.2 the costs will include the costs occasioned by the appearance of 14 August 2013.

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L. le R. POHL, AJ

On behalf of applicant:	Adv P. J. J. Zietsman Instructed by: Van Deventer Thoabala Inc. BLOEMFONTEIN
On behalf of first respondent:	Adv C. D. Roux Instructed by: L & V Attorneys BLOEMFONTEIN

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