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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

Case no: 1196/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED.

DATE: 25/04/2025

SIGNATURE:

In the matter between:

KAAP AGRI BOEDERY

Plaintiff

(Registration number: 1995/000336/06)

And

CORNELIUS JOHANNES POTGIETER

Defendant

(Id- number: 7[...])

Judgment

MB LETSOALO AJ

Introduction

[1] This judgment is pursuant to the Stated Case delivered by parties in terms of Rule 33 of the Uniform Rules of this Court. It arises from a claim by the creditor, the Plaintiff herein, against a surety, the Defendant herein, subsequent to the release of the principal debtor, Somerhoek Boerdery (PTY) Ltd (under business rescue) ("Somerhoek"). The release follows the adoption and implementation of the Business Rescue Plan by the creditor. The claim is for the outstanding amount in respect of credit granted. Does the release of a principal debtor relinquish continued liability?

Agreed facts

[2] The Plaintiff granted credit facility to Somerhoek for a 30 day facility and also on a seasonal facility. The Defendant had on 9 June 2009 entered into a Deed of suretyship in favour of the Plaintiff for Somerhoek's indebtedness to the Plaintiff. He bound himself as a surety and co- principal debtor from time to time. Somerhoek became in default with its repayment to the Plaintiff. Somerhoek was placed under business rescue proceedings on 14 March 2022. A total claim of R3 773 369, 00 made by the Plaintiff was admitted in the business rescue proceedings as a concurrent claim.

[3] The Business Rescue Plan in respect of Somerhoek was adopted on the 21 October 2022, to which the Plaintiff voted in favour. The relevant extract of the Business Rescue Plan inter alia provides as follows:

"... 5.2 The extent to which the company is to be released from and/or the repayment of their debts are restructured:

5.2.1 If this BR Plan is adopted and implemented as contemplated in section 152 of the Act, all claims against the company will be compromised and/or discharged on final repayment of dividends in terms of this BR Plan and creditors will lose the right to enforce any claims or part thereof against the company.

5.2.2 This BR Plan does not affect the rights of any creditors to pursue claims against persons who stood as surety for the debts of the company..."

[4] On the 9th February 2023 the Plaintiff instituted this action against the Defendant as surety of Somerhoek for recovery of R4 096 826, 77. The damages are formulated as Claims A and B respectively in terms of the POC as follows; 30 days facility for R839 441, 67 and seasonal facility for R3 257 385, 10; each claim to incur interest at the rate of 24 per cent per annum calculated daily and capitalised monthly from 1 October 2022 until date of final payment; further credit life insurance premiums plus attorney and own client legal costs.

[5] In his Plea the Defendant raised as a defence the release of the surety in toto due to the Plaintiff's refusal and/or negligent and/or failure to collect the crop income under the cession. The written cession entered into on or about 17 August 2021 between Somerhoek and the Defendant, constituted a security in favour of the Plaintiff.

[6] In contestation the Plaintiff replicated that it had the discretion to release or defer security by Somerhoek without prejudicing its claim against the surety; alternatively that the cession did not apply to the maize but wheat crop of 2021 which was sold and paid to RDP Enterprises (Pty) Ltd; and further alternatively that Landbank enjoyed preference to the proceeds. In effect, that there are no other proceeds recoverable in terms of the cession and none reflected in the Business Rescue Plan. Further that the Plea does not disclose a valid defence to the claims.

[7] The parties delivered a Stated Case on 23 January 2025 for the same claim(s) as in para 4 above except for further credit life insurance limited to Claim A only. It is common to the parties that the whole claim of the Plaintiff against Somerhoek was released in terms of section 154(1) of the Companies Act 71 of 2008 (the Act).

Issue in dispute

[8] The release of the Defendant in terms of section 154(1) of the Act as it is with Somerhoek, the principal debtor.

Legal framework and analysis

[9] Defendant contends that by virtue of the acceded and implemented Business Rescue Plan in terms of section 152 of the Act, the principal debt has been discharged. Further that in terms of section 154(1) of the Act, the Plaintiff is consequently and as a result of the accessory nature of the obligation owed by the surety to a creditor, precluded from claiming payment of these debts from the Defendant.

[10] Further that there is no provision in the Deed of Suretyship that can be interpreted to have the effect that the Defendant remains obliged to the Plaintiff subsequent to a compromise and discharge of the principal debt. That such a provision would create indebtedness, a principal obligation, by the erstwhile surety to the creditor, which is not applicable hereto.

[11] Reliance by the Plaintiff of the clauses of the Deed of suretyship in support of its contentions, is submitted does not aid the Plaintiff's claim against the Defendant. Clause 1.3.2 is said to merely provide that the creditor may give extension or settlement with other sureties. Clause 1.5.1.2 is said to provide that should the debtor be under sequestration or be wound up or be placed under judicial management, the creditor is entitled without prejudice to claim the full indebtedness from the suretyship. Clause 1.20 is said to provide that should the principal debtor surrender its estate or be placed under judicial management, the surety's obligation in terms of the suretyship shall remain. It is submitted that such contentions cannot be sustained as neither provides that the surety will remain liable despite a discharge or compromise of the principal obligation nor the eventualities catered thereto has occurred.

[12] The Plaintiff submits that the nature and extent of the discharge and /or release of Somerhoek is determinable by the intention of the parties as outlined in the Business Rescue Plan. That the expressed wording of the plan limits the discharge in clause 5.2.1 to Somerhoek only but with clause 5.2.2 recording that the

business rescue plan does not affect the rights of any creditors to pursue claims against persons who stood as surety for the debts of Somerhoek.

[13] And further read with the terms and conditions of the Deed of Suretyship annexed to POC as K7. The effect of clause 1.3.2 thereof it is submitted is that, the settlement or agreement with the debtor, does not affect the claim against surety and also that of clause 1.5.1.2, 1.20 and 1.21 thereof regarding continued liability of the surety in the event of insolvency, judicial management, surrender or compromise.

[14] According to *Van Zyl v Auto Commodities (Pty) Ltd* (279/2020) [2021] ZASCA 67 (3 June 2021) in para 11 and 12 "a contract of suretyship is distinct from the contract or contracts between the principal debtor and the creditor that give rise to the principal indebtedness, but it is accessory to that contractual relationship and the principal debtor's obligation under it. A consequence of this is that if the principal debtor's debt is discharged, whether by payment or release, the surety's obligation is likewise discharged."

[15] Van Zyl in para 23 state that "where such a provision is contained in the business rescue plan and a creditor accedes to the discharge of the debt, they will lose the right to enforce it. That is a strong language. The debt is discharged, which conveys in ordinary parlance that it ceases to exist. The creditor who has acceded to such a proposal not only loses the right to enforce the debt owed to them by the company in business rescue, but the debt itself is discharged."

[16] The parties herein are in agreement not only in regard to the business rescue plan been acceded to by the Plaintiff and implemented but as to the general principle of suretyship too.

[17] However the Plaintiff submits that in this case the release of the surety is subject to the discharge/release agreement, the Business Rescue Plan, which provides to the contrary to the general principle of suretyship. That in terms of the Business Rescue Plan, the Defendant remains liable as per clause 5.2.2 despite the release of Somerhoek in clause 5.2.1. Clause 5.2.2 provides that the Business

Rescue Plan does not affect the rights of the Plaintiff to pursue claims against the Defendant who stood as surety for the debts of Somerhoek.

[18] The Plaintiff further distinguishes the claim from the debt. It submits that for the Plaintiff to lose a right to pursue the Defendant, the debt must be discharged as provided for by section 154(1) of the Act. It submits however, that in terms of the Business Rescue plan, it is not the debt discharged but rather the claim and against Somerhoek only, consequently not a discharge in terms of section 154(1) of the Act. It argues that the heading of clause 5.2 fortifies its contention in that it refers to "the extent to which the company is to be released from and/or the repayment of the debt is restructured" which is required by section 150(2)(b)(ii) of the Act. The latter section requires the business rescue plan to include a statement of the extent to which the company is to be released from payment of any of its debts¹.

[19] Section 154(1) of the Act is submitted for the Defendant to be permissive in nature in that the Business Rescue Plan may contain a provision that operates to discharge the company's indebtedness². He further submits that he is fortified by clause 8.4.2 of the Business Rescue Plan which provides that upon the adoption and implementation of it, each creditor will lose the right to enforce any part of their claim which is deemed to be written off in terms of this plan.

[20] In terms of section 154 of the Act regarding the discharge of debts and claims it provides as follows: (1) that "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 and; (2) that "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. "

¹ van Zyl , para 22.

² Van Zyl, para 22.

[21] Van Zyl in para 31 states that "an agreement between the creditor and the principal debtor that the creditor will not pursue its claim against the debtor, may provide, either expressly or tacitly, that the creditor's rights to pursue the surety remains extant. In *Wides v Butcher*³ it was held that the creditor may by agreement discharge the principal debtor from liability, without at the same time discharging the surety, provided the terms of the discharge agreement between creditor and debtor reserve the right of the creditor to pursue the surety".

[22] By own submission above the Defendant concede that the mere accession and implementation of the Business Rescue Plan does not amount to automatic discharge of Somerhoek. The parties to the business rescue are at liberty to construct the terms and conditions of the business rescue plan as to how the debtor is to be released⁴. The submission therefore that the Defendant is discharged from liability subject to the provisions solely of clause 5.2.1, I find to be excluding and contrary to the very effect of the liberty of the Plaintiff and Somerhoek and also the provisions of clause 5.2.2 read with section 154 of the Act.

[23] Clause 5.2.2 which is part of the Business Rescue Plan incorporates the parties' further expressed intent in the form of conditional terms and conditions provided for in Section 154(1) of the Act, as contended for the Plaintiff. The Plaintiff and Somerhoek expressly agreed therein that the creditor will not lose his right of recourse against the surety.

[24] "A creditor who releases the principal debtor from all liability can have no complaint if the same act deprives it of the benefit of the protection provided by the deed of suretyship. It can protect itself against this by specific provisions in the deed of suretyship or, as will be shown, by the terms of the discharge agreement"⁵,

[25] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 it was held that: "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory

³ *Wides v Butcher* (1905) 26 NLR 567 at 584 - 585

⁴ Section 154(1) read with para 31 of van Zyl above.

⁵ See Van Zyl para 25.

instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.(own emphasis) Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision (own emphasis) and the background to the preparation and production of the document."

[26] When regard is had to the interpretation of the Business Rescue Plan, I find that clause 5.2.1 is conditional or subject to clause 5.2.2. Clause 5.2.2 is the protection created in favour of the Plaintiff against the discharge or release of the debt or claim⁶. By its incorporation it is evident that the parties did not intent to strip off the Plaintiff of the right to pursue the claim against the Defendant despite the release of Somerhoek in clause 5.2.1. This is the most sensible meaning of clause 5.2.2 read in context and purpose of the provisions of both clauses 5.2.2 and 5.2.1. Had it been their intent, clause 5.2.2 would have simply been omitted. The effect of the use of the term 'claim' and not debt been released in clause 5.2.1 is therefore neither here nor there. The expressed implication of clause 5.2.2 is that the claim/debt remains intact.

⁶ See para 24 above.

[27] Therefore, the submission that the debt is deemed to be written off in terms of clause 8.4.2 cannot stand. Clause 8.4.6 of the Business Rescue Plan provides for severability of each and every clause and sub clause of the BR Plan and that the validity or enforceability of the remaining clauses and sub clause shall not be affected by any void, invalid or unenforceability thereof. It is not any parties' case that a particular clause of their BR Plan is void, invalid or unenforceable. In particular, the Defendant does not attack nor can successfully wish away the provision of clause 5.5.2 thereto. As a result this clause remains part of the BR Plan subject to enforcement. The submission that the sureties are not released from liability towards creditors on the interpretation of clause 5.2.2 is probable.

[28] In the event the Business Rescue Plan did not incorporate clause 5.2.2, the submission by the Defendant would be sustainable. The Plaintiff would have been stripped of the right to pursue the debt or claim against the Defendant as the debt would have been compromised or discharged in whole or true sense. The Defendant's fate would however still be dependent on the absence or the provisions thereof of a deed of suretyship.

Deed of suretyship

[29] The Plaintiff contented that the provisions of the clauses in the deed of suretyship in this matter are akin to those in van Zyl matter and that the same interpretation and finding should be followed. Clauses 3 and 5 provided for eventualities like leniency or extension of time or compound or such other arrangements, insolvency, liquidation, judicial management of the debtor [BCM] and specifically clause 5.4 (compromise) with the debtor.

[30] The specific extract of the deed of suretyship clauses relied upon by the parties herein provides that ;

1.3 The Creditor may, at its sole discretion, at any time without prejudice to any of its rights and without notice to the surety(s) (or any of them) –

1.3.2 may grant a deferment to, or enter into a settlement or make any other arrangement with the persons mentioned in 1.3.1 or the debtor(s) in respect of the payment of their debt to, or the performance of their obligation to, the Creditor

1.5 if the debtor(s) is/are voluntarily or forcibly provisionally or finally sequestrated or liquidated or placed under judicial administration or surrenders his/her/their estate or the debtor(s) enters into a composition with his/her/their creditors –

1.5.1 the Creditor shall be entitled, without prejudice to any of his/her rights under this suretyship deed-

1.5.1.2 to recover from the surety(s) the full amount of the Creditor's total claim, whether actual or conditional, against the debtor(s), provided that the Creditor shall transfer or repay to the surety(s) any amount it receives from the debtor(s) or the estate(s) of the debtor(s) or from the surety(s) and which exceeds the amount of its claims against the debtor(s)

'1.20 if the debtor(s) surrenders his/her estate or is placed under judicial administration, whether provisionally or finally, the obligations of the surety(s) hereunder shall continue and cover all obligations incurred by the debtor(s) towards the Creditor while the debtor(s) is/are thus under surrender or judicial administration,'

'1.21 security created by this deed is a continuous covering security, notwithstanding any fluctuation in the amount of the debtor(s)' debt and other obligations to the Creditor or a temporary extinction thereof, and notwithstanding the death or the voluntary, compulsory, provisional or final insolvency or placement under judicial administration or surrender of the estate of the debtor(s),'

[31] The court in van Zyl dealt with the right of recourse against the surety subsequent to the business rescue proceedings and on assumption that the BCM's

debt to Auto Commodities, the creditor was discharged. The difference between the two matters is based on; (a) the deeds of suretyship, in that in this matter there is no specific reference to "compromise" and (b) the business rescue plan, in that in van Zyl it did not contemplate that Auto Commodities would be entitled to pursue the balance of its claim against Mr van Zyl. However same phraseology applies in that in those eventualities the surety would remain liable for the balance of the debt not paid by the debtor⁷.

[32] The material portion of the judgment of Dove- Wilson J in *Wides v Butcher* clearly set out the position where the debt is not extinguished but unenforceable. "...[A] discharge of the debtor does not liberate the surety if the remedy against the surety is expressly reserved, because in that case the discharge is not an absolute release but is merely a *pactum de non petendo*. The reservation has that effect, because it rebuts the presumption which ordinarily exist that if you liberate the principal debtor, you mean to liberty also the surety, and it has the effect of preserving the right of recourse by the surety against the principal debtor. *The test whether or not the discharge which has been given is absolute, or merely a covenant not to sue, is whether the debtor is, after the discharge, put in the position of being able to say to the creditor that "It is inconsistent with the discharge which has been given to him that there should be any right of recourse against him by the surety." If the debtor is not in a position say so, then the surety is not discharges.* '⁸

[33] There is a protection created in favour of the Plaintiff in the Deed of suretyship as discussed in para 25⁹ above and following the judgment of Dove-Wilson J above. The rights of recourse against the Defendant are expressly reserved in clause 1.20 and 1.21 read with clause 1.5.2 which provides for the continued surety's obligation and continuous covering security despite any legal process related to insolvency, liquidation or any arrangement. The Business Rescue Plan related to Somerhoek's Business Rescue proceedings constitutes an arrangement and/or settlement through payment thereto with the Plaintiff, as it is at liberty to do so in terms of clause 1.3,

⁷ van Zyl para 7.

⁸ van Zyl para 33. See also *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greet and Another* 2014 (4) SA 521 (WCC) at para 43 [iv].

⁹ van Zyl para 25.

1.5.1 and 1.3.2. The absence of the specific wording *business rescue* or *compromise* from *eventualities* or provisions listed in the deed of suretyship is as a result immaterial.

[34] Van Zyl has this to say in para 5: "... and that no such action on Auto Commodities' part shall affect or in any way be construed to operate as a waiver or abandonment of any of Auto Commodities rights or claims against the us [sureties] "

[35] The rights of the Plaintiff emanating from the deed of suretyship are not jinxed in anyway by the arrangement, which is the accession and implementation of Somerhoek's Business Rescue Plan. Put otherwise, the Defendant's obligations towards the Plaintiff are not affected by the liberation of Somerhoek through Business rescue proceedings. Clause 1.5.2 unequivocally specify the Plaintiff's entitlement and also without prejudice, these right of recourse against the Defendant. Clause 1.3 and entitles the Plaintiff to enter into any arrangement with Somerhoek without prejudicing his right against the Defendant. Moreover clause 5.2.2 of the Business Rescue Plan intentionally negates any assumption of waiver or abandonment of his right of recourse against the Defendant¹⁰.

[36] The ruling in van Zyl was that "the primary argument on behalf of Mr van Zyl that his liability to Auto Commodities was discharged upon adoption and implementation of the BCM business rescue plan must fail."¹¹ The Defendant had agreed to his continued liability and therefore, cannot be automatically liberated.

Conclusion

[37] The evidence inevitably proves that the Plaintiff's right of recourse against the Defendant is protected and also reserved in both the Business Rescue Plan and the deed of suretyship¹². The submission on behalf of the Defendant that his obligation towards the Plaintiff is discharged or compromised as is the debt against the Plaintiff stands to fail. I find that the continued liability of the Defendant is not extinguished as

¹⁰ See para 21 above.

¹¹ para 45.

¹² van Zyl para 25 above.

the discharge or release of the debt or Somerhoek is not absolute¹³. Therefore, an exception is created to the general principle that the release of the debtor from its liability amounts to the discharge of the obligations of the surety.

[38] I find that the Plaintiff have proved its case against the Defendant on a balance of probabilities. As I uphold the legal view pointed out for the Plaintiff, I intend granting judgment as well as costs and interest in his favour¹⁴. However awarding cost on attorney and own client as pleaded for the Plaintiff scale even if it was agreed to by the parties in the deed of suretyship seems as a hefty punishment and not justifiable. I do not find it just, fair and reasonable.

Order

[39] I make the follow order;

Judgment is granted in favour of the Plaintiff against the Defendant as follows:

- (a) payment of an amount of R839 441,67;
- (b) payment of interest on an amount of R839 441,67 at the rate of 24 per cent per annum calculated daily and capitalised monthly from 1 November 2022 until final date of payment;
- (c) payment of an amount of R3 257 385,10;
- (d) payment of interest on an amount of R3 257 385,10 at the rate of 24 per cent per annum calculated daily and capitalised monthly from 1 November 2022 until final date of payment; and

¹³ van Zyl para 33 above. See also *Bank of Africa Ltd v vom Dorp* (1909) 25 SC 143, Maasdorp, J at p 150 and 151

¹⁴ *New Port Frame Co (Pty) Ltd and another v Nedbank Ltd* 2026(5) SA 503 (SCA) in para 12 "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".

(e) payment of legal costs of the Plaintiff on the scale as between attorney and client.

**LETSOALO MB
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION**

DATE OF HEARING: 29.01.2025

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and release to SAFLII. The date and time for hand-down is deemed to have been at 10:00 on 25 April 2025.

APPEARANCES

**FOR THE PLAINTIFF ADV JJ PRETORIUS
INSTRUCTED BY GERRIT COETZEE ATTORNEYS**

**FOR THE DEFENDANT ADV R RAUBENHEIMER
INSTRUCTED BY JACOBS ROOS FOUCHE INC**