IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NOS: 096544/2024; 2024/095886, 2024/095980, 2024/096942, 2024/096572 and 2024/096560.

DATE: 21.04.2026

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES : NO
(3) REVISED

[redacted]

SIGNATURE DATE: 21 April 2026

In the matter between

BMW FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD — Plaintiff

and

123MDS (PTY) LTD AND OTHERS — Defendants

J U D G M E N T *EX TEMPORE*

WILSON, J: The issue in each of these summary judgment applications is identical. The first defendant, 123MDS, entered into a finance agreement with the plaintiff, BMW, for the purchase of six motor vehicles which are the subject of each of the individual claims. In each matter the second defendant, Mr Van De Werken, and the third defendant, Mr Van Wyngaard, stood as sureties for 123MDS's performance under the agreement in each case.

123MDS went into business rescue. BMW was a creditor in the business rescue proceedings. Its claim was recognised by the business rescue practitioner and BMW participated in the business rescue proceedings. BMW in fact voted in favour of a business rescue plan. The principal controversy is what is meant by clause 18.2 of that plan.

Clause 18.2 of that plan, reads as follows.

Under the heading: "[t]he extent to which the company is to be released from payment of its debts." it is recorded that:

> "Creditors can still assert their rights against individuals who acted as sureties or guarantors for the company's debts under the plan. If the company voluntarily surrenders movable assets in the form of vehicle asset finance agreements to its security holder by agreement, any resulting shortfall would be treated as a concurrent claim and included in the compromise as a full and final settlement of the security holder's claim against the company."

What that rather inelegantly expressed clause means, according to the defendants, is that in the event that

123MDS surrendered the six vehicles that are the subject of these summary judgment applications to BMW, the vehicles would be sold and any difference between the price realised and the remaining amounts due under the finance agreement would be treated as a concurrent claim in the business rescue. That, the second and third defendants say, was the compromise reached with BMW. Its effect, they say, was to extinguish the principal claim, and release the sureties from their liability.

BMW says otherwise. It relies heavily on the opening sentence of clause 18.2, which as I have said, says that:

> "The creditors can still assert their rights against individuals who acted as sureties or guarantors for the company's debts under the plan."

In correspondence that has passed between the parties, each side in these cases takes a diametrically opposed view of the meaning of clause 18.2. If the defendants are right, then the claims against them as sureties have been compromised and they were released as a result.

If BMW is right, the claims were not compromised to the extent that BMW was still entitled to claim any difference between the sum realised when the vehicles were sold on surrender and the amount outstanding on the finance agreements.

The question at the summary judgment stage is of course whether the defence raised by the defendants, in other words the defendants' interpretation of clause 18.2, raises a triable issue.

I was taken during argument to various decisions of the Supreme Court of Appeal and of the High Court, which tend towards the view that there is little if any scope, for a business rescue process to release a surety from their obligations by operation of law.

What has been left open, particularly in terms of the decision of *Van Zyl v Auto Commodities (Pty) Ltd* 2021 ZASCA 67, handed down on the 3rd of June 2021, is whether a business rescue plan, which has been acceded to by a creditor, can compromise the creditor's claim in such a manner that releases the sureties from their obligations.

On the face of things, it is at least a plausible reading of clause 18.2, that that is exactly what has happened. Clause 18.2 is reasonably capable of meaning that a creditor can <u>either</u> pursue the sureties directly, or accept voluntary surrender of the vehicles from the company and then pursue a concurrent claim for the shortfall in the business rescue. I also see the sense in BMW's interpretation of clause 18.2, which is that nothing of the sort happened and that the clause preserves its right to pursue the sureties for their obligations under the finance agreement and the suretyship, even if the vehicles are surrendered.

When faced at the summary judgment stage with two reasonably plausible interpretations of a document which is material to the plaintiff's entitlement to relief, there must, it seems to me, be no doubt that there is a triable issue, especially when regard is had to the fact that the business rescue plan will have to be interpreted in light of all the circumstances surrounding its adoption, and particularly in light of the fact that BMW voted for it.

Accordingly, I am satisfied that the second and third defendants in each of these matters have raised an issue fit for trial in the form of the controversy that I have outlined. Accordingly, in each of these cases, the following order is made:

1. Summary judgment is refused;
2. The second and third defendants in each matter are granted leave to defend;
3. The costs of the summary judgment applications will be costs in the trial.

[redacted]

……………………………….
WILSON, J
JUDGE OF THE HIGH COURT
<u>DATE</u>: 21 April 2026