THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 07897/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

23 February 2017 .....
DATE SIGNATURE

In the matter between:

SAPOR RENTALS (PTY) LIMITED **Applicant**

And

FAHEEM TAYOB **Respondent**

JUDGMENT

RATSHIBVUMO AJ:

[1] In this application, the applicant seeks an order against the respondent for a payment of R400 392.22 plus interests and costs order. The application is based on a Continuing Guarantee (guarantee) signed by the respondent in terms of which he bound himself as guarantor for the indebtedness of Geochris Investment CC (the principal debtor) in favour of the applicant. The guarantee was signed following a written Master Rental Agreement (the agreement) entered into between the applicant and the principal debtor on 27 October 2014.

[2] In terms of the agreement, the applicant leased out the equipment to the principal debtor, who in turn was to make 60 monthly rental payments of R8 094.00 towards the applicant. The equipment was received in good condition by the principal debtor on the date of the agreement. As of 15 January 2016, the principal debtor was in arrears in the amount of R16 467.63 which reflects arrears for just over two months.[1] The Applicant now claims for the amount as per notice of motion based on the principal debtor's breach of agreement which makes the whole amount due and payable. The liability of the respondent is based on the guarantee.

[3] The Respondent does not dispute the factual averments by the applicant. He however denies his liability to the applicant on three bases. First, he alleges that the applicant repossessed the leased equipment, 15 months into the lease agreement. Paying the applicant the full amount as per agreement would as such unjustly enrich him. Second, the claim is precluded by sec 133 of the Companies Act, no 71 of 2008 (the Act) in that the principal debtor is under business rescue proceedings and may be placed under liquidation should those proceedings fail. Third, the Respondent alleges that the applicant entered into another agreement in terms of which the leased equipment the losses by the principal debtor.

Interlocutory order

[1] See Certificate of Indebtedness on p. 19

[4] *Application for condonation* – Respondent's answering affidavit. When the matter was argued on 01 February 2017, I granted an order of condonation of the late filing of the answering affidavit and made no costs order. Rule 27 (1) provides,

> "In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet."

The application may be made after the expiry of the prescribed or fixed period and the court is empowered to make an order concerning the recalling, varying or cancelling of the results of the expiry of time.[2] As to the meaning of good cause, every case needs to be judged on its own merits. It is however generally accepted that the court would consider the reasons for noncompliance so as to determine if there was wilful conduct on the part of the applicant, the existence of *bona fide* defence to the claim and the prejudice the respondent may suffer.[3]

[5] The application for condonation by the respondent is in respect of the late filing of the answering affidavit after he entered notice to defend. The notice to defend was entered by the respondent's attorney on 22 March 2016. The answering affidavit was only served on 27 June 2016. In explaining his delay, the respondent attaches flight tickets that confirm that he was overseas from 13 December 2015 to 11 June 2016. He only learned of the papers served on his property from a neighbour. He was not able to properly and fully consult with the attorney given the 8 hours difference between South Africa and the country he was visiting, save for the entry of notice to defend the motion. Once back in the country, the respondent

[2] *Subramanian v Standard Bank Ltd* [2013] JOL 30321 (KZP).
[3] *Madinda v Minister of Safety and Security* [2008] 3 All SA 143 and *Pienaar v AA Mutual Insurance Association Ltd* 1970 (3) SA 714 (W).

consulted his attorney and counsel and an affidavit setting out a defence as paragraph 3 above was prepared and served.

[6] These reasons reflect that the respondent's failure to serve the answering affidavit within 15 days as required was not due to a wilful conduct on his part. He was not aware that once he leaves the country, a notice of motion would be served. It cannot as such be suggested that he was running away or he should have cut short his visit. Equally, I was satisfied that the defences raised above could absolve him if they were proved. The defence raised by the respondent deserved to be fully ventilated as the matter could result in serious injustice if judgment was to be given without its consideration. Lastly, I was satisfied that the applicant would suffer very little prejudice if any since a replying affidavit was filed in advance, just in case the condonation was allowed. For these reasons, I granted the interlocutory order above.

[7] The allegations of repossession of the equipment and the oral amendment of the agreement are vehemently disputed by the applicant. The Respondent suggests that for the court to make a finding, oral evidence is necessary and the court should make such order. I do not see a need for this because of the non-variation clause that exists in the agreement. There is no dispute that the agreement was in writing and that it contained non-variation clause. In *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere*[4] the Appellate Division held that a term in a written contract providing that all amendments to the contract have to comply with specified formalities is binding. The principle has been consistently reaffirmed, most recently in *Brisley v Drotsky*[5]. Courts have in the past, often on dubious grounds, attempted to avoid the *Shifren* principle where its application would result in what has been perceived to be a harsh result. Typically, reliance has

[4] 1964 (4) SA 760 (A)
[5] 2002 (4) SA 1 (SCA)

been placed on waiver and estoppel.[6] The Respondent *in casu* does not suggest waiver or estoppel on the part of the applicant.

[8] The object of a clause in an agreement providing that a contractor shall not be released from any liability unless such release be in writing is to protect the creditor. It enables the creditor to determine its rights with reference to the documents in its possession. The creditor does not have to rely on the memory of its employees or ex-employees. It protects the creditor against spurious defences and unnecessary litigation. The need for such provision is even greater where the creditor is a large organisation comprising different divisions and employing a large number of people. A contractor, on the other hand, is unlikely to be prejudiced. Big institutions (such as the banks) do not lightly release parties to contracts such as sureties where the debt of the principal debtor remains extant. If there is release, it is in the interest of both parties that it be readily capable of proof.[7]

[9] While counsel for the respondent argues that it is the applicant who caused the principal debtor to default by repossessing the equipment, 15 months into the agreement, this cannot be true because a careful calculation of 15 months from 27 October 2014 would end in February 2016. The certificate of indebtedness issued on 15 January 2016 reflects that at that time, the principal debtor was in arrears of more than two months already. For that reason, these submissions are far-fetched and highly unlikely.

[10] The last defence raised is based on sec 133 of the Act which provides,

> "General moratorium on legal proceedings against company.—(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—

[6] *HNR Properties CC and Another v Standard Bank of SA LTD* 2004 (4) SA 471 (SCA) at p. 479.
[7] *HNR Properties CC and Another v Standard Bank of SA LTD* supra at p. 478 para A-B.

(*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*) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;

(*d*) criminal proceedings against the company or any of its directors or officers;

(*e*) proceedings concerning any property or right over which the company exercises the powers of a trustee; or

(*f*) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances."

[11] Just as Rogers J observed in *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and another*[8], the Act does not address the issue of the effect by the adoption of a business rescue plan on creditors' rights against sureties. Once business rescue proceedings have commenced, the distressed company is protected from legal proceedings by way of the moratorium provided for in section 133 of the Act. The general principles of our law of suretyship must thus be applied to determine what effect, if any, the provisions contained in any particular business rescue plan have on sureties. If the principal debt is discharged by a compromise with or release of the principal debtor, the surety is released unless the deed of suretyship provides otherwise. This general principle applies also to a compromise or release pursuant to a statute, regardless of whether the creditor himself supported the compromise or release. Accordingly, if a business rescue plan provides for the discharge of the principal debt by way of a release of the principal

[8] [2014] 3 All SA 500 (WCC)

debtor, and the claim against the surety is not preserved by such stipulations in the plan as may be legally permissible, the surety is discharged.

[12] I refer to the *Tuning* decision with due diffidence since the matter *in casu* does not emanate from a suretyship but a continuing guarantee the terms of which make the respondent equally liable on terms not similar to a suretyship. My further concern is that the terms of the said business plan were not pleaded in papers before me, so I could see if the principal debtor has indeed been discharged, so the status of the respondent could be determined. As part of the guarantee, the respondent bound himself to a clause providing,

> "This guarantee is a continuing obligation and nothing in this agreement shall be interpreted as an intention on either party to create a suretyship. Hirer need not institute action against, or exhaust its rights and remedies against the User and/or other person/s, Hirer need not divide all the amounts owing by User's to Hirer between me/us… My/our performance and/or liability under this Guarantee shall be absolute and unconditional irrespective of whether (i) the underlying cause of the User's indebtedness to the Hirer has no legal effect, is capable of being legally avoided by any party thereto or if it is unenforceable…"

[13] Even if the guarantee was to be interpreted as a suretyship (of which it is not given the clauses some of which were quoted above); there is nothing in the Act that would stay any legal action against the respondent pursuant to the guarantee.

[14] *Costs*: I am satisfied that the postponement on 01 July 2016 was necessitated by the absence of an answering affidavit by the respondent being properly before court owing to the respondent's failure to apply for condonation. I do not see why costs for that day should not be awarded to the applicant. The Applicant also asked for the costs in that the matter stood down from 31 January 2017 to 01 February 2017 because of the absence of counsel for the respondent. I am not persuaded to grant these costs because the matter was not postponed but merely stood over to the

next day of the same week it was allocated to. It is practice that counsel need to avail themselves for the whole week into which the opposed matter is enrolled. Moreover, once it became clear that counsel for the respondent was not going to make it in time on 31 January 2017, she communicated telephonically with the applicant's counsel who was willing to have the matter stood down to the following day.

1. I therefore make the following order:

1.1 The Respondent is ordered to pay the amount of R400 389.22;

1.2 The Respondent is ordered to pay the interest on the amount of R400 389.22 at the rate of prime plus 6 (six) (prime is currently 10.25%) from the date of issue of the application to the date of final payment.

1.3 The Respondent is ordered to pay the costs of the application including the costs occasioned by the postponement on 01 July 2016 on a scale of an Attorney and own Client calculated on Magistrates' Court scale.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard:	**01 February 2017**
Judgment Delivered:	**23 February 2017**
For the Applicant:	**Adv. JJ Durandt**
Instructed by:	**Jay Mothibi Inc** **Johannesburg**

For the Respondent:	**Adv S Rawat**
Instructed by:	**Yousha Tayob Attorneys**
	Johannesburg