REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 19832/2020

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

Date: 8 March 2022 2022 E van der Schyff

In the matter between:

RODNEY GLYN NORMAN APPLICANT

and

CASH FLOW CAPITAL (PTY) LTD RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] This is an application for rescission of a judgment granted by default on 6 May 2021. The applicant's late filing of the rescission application and the respondent's late filing of the answering affidavit are condoned.

[2] It is trite, and was again confirmed by the Supreme Court of Appeal in *Vhembe District Municipality v Stewarts & Lloyds Trading (Booysens) (Pty) Ltd and Another*[1] that in order to succeed with an application for rescission of a default judgment, an applicant must show good cause. As it was explained in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape),*[2] courts generally expect an applicant to show good cause: (a) by giving a reasonable explanation for the default; (b) by showing that the application is made *bona fide*; and (c) by showing a defence to the plaintiff's claim which *prima facie* has some prospect of success.

[3] The applicant's application is premised on Rule 31 insofar the judgment was granted in his absence. He contends however, that the judgment was sought and granted in error, in his absence and also relies on Rule 42.

Particulars of claim

[4] The respondent issued summons against the applicant during March 2020. In the particulars of claim the respondent avers that it entered into and concluded a loan agreement with Chrome Supplements and Accessories (Pty) Ltd (Chrome) on 7 November 2019. Chrome was represented by the applicant. An amount of R 1 542 000,00 was lent and advanced to Chrome, who would repay an amount of R 1 821 060,00 to the respondent by way of daily debit orders.

[5] On the same date, the respondent entered into and concluded a guarantee with the applicant. The applicant irrevocably and unconditionally guaranteed as a primary obligation in favour of the respondent, the due and punctual performance by Chrome of any and all indebtedness or obligations of any nature whatsoever of Chrome to the respondent in terms of the loan agreement.

[6] Chrome breached the terms of the loan agreement by failing to make punctual payments of the instalment amounts. The respondent turned to the guarantor, who

[1] [2014] 3 All SA 675 (SCA) para 4.

[2] 2003 (6) SA 1 (SCA) para 11.

by signing the guarantee, undertook to pay the plaintiff on first written demand, all sums that are due, owning and payable or incurred by Chrome to the respondent.

[7] The respondent's claim against the applicant is premised on the guarantee.

Service of the summons

[8] It is common cause that the summons was served by the Sheriff at the applicant's chosen *domicilium citandi et executandi.* This is coincidentally also the applicant's residential address. The Sheriff's return indicates that the summons was served in the temporary absence of the applicant upon 'DOBSON, GENERAL WORKER, a person apparently not less than sixteen years of age and apparently in charge there, after the original document was displayed and the nature and contents thereof was explained to him.'

[9] In the founding affidavit to the rescission application, the applicant denies that he received the summons. He acknowledged that prior to 25 March 2020 a person by the name of Dobson was working at his house, but that he had to let him go due to financial constraints. He merely allowed Dobson to pick lemons in his yard because he was doing work for other people in the estate. He denies that Dobson was in charge of the premises as he was not working on the premises there. The applicant contests the fact that the nature and content of the document served could have been explained to Dobson, because Dobson is from Malawi and can barely understand English.

[10] Rule 4(1)(a)(ii) of the Uniform Rules of Court provides for service 'by leaving a copy thereof at the place or residence or business of the said person ... with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age.' The said Rule does not prescribe service on the person actually in charge of the premises, but on a person apparently in charge. Rule 4(1)(a)(iv) provides that 'if the person so to be served has chosen a *domicilium citandi*, by delivering or leaving a copy thereof at the *domicilium* so

chosen.[3] On the explanation tendered by the applicant the Sheriff's assumption that Dobson was a general worker on the premises and that Dobson was in charge of the premises in the applicant's temporary absence, cannot be faulted. It cannot be found on these facts that service of the summons was not effected in accordance with the rules of court and that the proceedings commenced without due notice to the applicant. The applicant's claim that the summons was, however, not brought to his attention, is also viable on the stated facts and it provides a reasonable explanation for his default. As explained to counsel at the onset of the hearing, this application turns on the question whether the applicant can succeed in showing a defence to the respondent's claim which *prima facie* has some prospect of success – because a good defence can compensate even for a poor explanation.[4] In light hereof the issue of alleged stale service of the summons becomes moot.

The applicant's defence

[11] The applicant is the sole director of Chrome. Chrome was a prospering business but unfortunately detrimentally affected by the Covid pandemic. On 3 February 2020 the decision was made to place Chrome in business rescue by way of a Special Resolution. Two business rescue practitioners were appointed, and a business rescue plan was draw up and made available to all known creditors.

[12] The business rescue plan provided, amongst others, for the following:

i. 'Claims' means secured, preferent or concurrent claims as envisaged in the Insolvency Act, against the company, the cause of action in respect of which arose, prior to or on the commencement date, of whatsoever nature and from whatsoever cause, including claims, arising from contract or delict, actual and contingent, prospective, conditional and unconditional, liquidated and unliquidated, assessed and unassessed and whether or not due for payment

[3] See *Amcoal Colliers Ltd v Truter* [1990] 1 All SA 248 (A).

[4] *Zealand v Milborough* 1991 (4) SA 836 (SE) at 838; *Carolus and Another v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 349B-E.

of performance, … and the effect of this business rescue plan shall be, once adopted, that no creditor shall have any further claims against the company, and consequently not entitled to any payment, after adoption of this business rescue plan, other than as provided for in terms of this business rescue plan;

ii. 'Creditors' means all legal entities, including natural persons, having secured, preferent and/or concurrent claims against the company as at the commencement date as envisaged in the Insolvency Act;

iii. 'Independent Creditors' means all creditors other than creditors related to the company and its subsidiaries and/or directors having claims against the company as at the commencement date as envisaged in the Act;

iv. 'Landlord Creditors' means the creditors which had claims against the company as well as the director in terms of suretyships entered into by the director pursuant to the relevant lease agreements;

v. 'Surety Creditors' means creditors having claims against the director personally by virtue of the director having bound himself as surety and co-principal debtor towards such creditors;

vi. The surety or surety means the director of the company;

vii. The BR Plan proposes that the financial proposer inject sufficient capital into the business to enable a dividend of 4.50 cents in the rand to be paid to creditors an additional 2.37 cents in the rand to security creditors and an amount of R250 000 to employees, to be shared by them on a pro rata basis to the aggregate value of their claims against the company. In addition, the company have entered into settlement agreements with certain landlords.

viii. During proceedings the BRPs have, in addition to what is stated above, inter alia, attended to the following:

a) Facilitated discussions between the company, certain creditors and the director, who had bound himself as surety for the performance of the company's obligations towards certain creditors;

ix. After extensive engagement between the director and certain landlord creditors – facilitated by the BRPs, the company proposed to the landlord creditors that they utilise the deposits and guarantees held by them in full and final settlement of the company's debt toward such landlord creditors. Most of the landlord creditors have, as at the publication date, accepted the offer

of the company ... The offer by the company towards the landlord creditors is a substantive part of this BR Plan and will become binding on the landlord creditors if this BP Plan is accepted by the company's creditors in terms of the Act.

x. Business rescue Plan: Part B – Proposals

a) To surety creditors, an estimated dividend of 2.37 cents in the Rand, being the same dividend which they may expect to receive in the event of the sequestration of The Surety, subject however, to a maximum amount of R650 000 being available for payments in terms of this paragraph;

b) Thereafter the balance remaining of the capital sum will be distributed pro rata to all creditors' claims (including Standard Bank and surety creditors but excluding SSA) of an estimated dividend of 4.50 cents in the rand, subject however to a maximum amount of the balance of R 850 000.00 being available for this purpose;

c) The rights of all creditors shall be confined to the right to claim payment in terms of this BR Plan and no creditor shall have any other claim against the company or the director after the date upon which such creditor received its payment in terms of this BR Plan

xi. The projected distribution to creditors, should the business rescue plan be adopted by creditors, will become final and binding in law on all affected parties, whether they attend the meeting or not;

xii. The surety creditors will in addition to the dividend of 4.50 cents in the rand, receive a further dividend of 2.37 cents in the rand being the same dividend which they may expect to receive in the event of the sequestration of the surety.

xiii. The adoption of the business rescue plan shall extinguish the right of any creditor to pursue the director who bound himself as surety and co-principal debtor with the company for any debt owing, of whatsoever nature and howsoever arising, by the company to such party

[13] The business rescue plan was adopted on 14 April 2020. A total of 80.22% of the creditors voted in favour of adopting the business rescue plan. The respondent took

part in the vote but voted against the business rescue plan being adopted. On 29 April 2020 the respondent, through its attorneys, informed the business rescue practitioners that it would not apply to have the business rescue plan set aside.

[14] It is necessary to pause and to reflect at this point that in this letter dated 29 April 2020, annexed to the founding affidavit, the respondent's attorneys of record, communicated, amongst other, the following:

> 'As mentioned at the Creditor's Meeting on 14 April 2020, my client has a guarantee in place from the Director which includes provisions that the Director's obligations are not affected by business rescue or a distribution made thereunder.
>
> It is not competent for a process of approval of a business plan to seek to comprise my client's claim against the Director in these circumstances. My client voted against the plan and placed on record that its claim against the Director will not be compromised. This position persists.
>
> In the circumstances, my client does not accept payment of the dividend of 2.37 cents in the rand as an alleged Surety Creditor. You are invited to pay 4.5 cents in the rand into my trust account, details of which are attached. My Client's rights to claim against the Director are expressly reserved. Any payment the company makes to my client in no way compromises its claim against the Director under the guarantee.
>
> My client does not intend, at this stage, to apply to have the plan set aside or liquidate the company and will proceed against the Director.'

[15] The business rescue plan has since successfully been finalised and the business rescue practitioners issued a Notice of Substantial Implementation of the plan on 14 May 2020. A payment was made to the respondent in the amount of R78 977.80, representing a dividend of 2.37 cents in the rand. Chrome is currently out of business rescue and freely trade again.

[16] The applicant submits that the respondent, as a creditor, is bound by the provisions of s 154(2) of the Companies Act, 71 of 2008. This holds that the respondent is bound to the provisions of the business rescue plan irrespective as to whether it voted against the business rescue plan. The applicant contends that as a consequence of the adoption of the business rescue plan, and payment in accordance with the plan to creditors, creditor's rights to claim against him as a director of Chrome is confined. The applicant submits that the business rescue plan specifically provides that creditors will not have any other claim against him as the director of Chrome, other than the claim against Chrome. Since a dividend was paid to the respondent, allegedly as a surety creditor, the respondent had no further claim against the director. The particulars of the respondent's claim contain no averment that the business rescue plan was adopted, or the content thereof, nor was such information disclosed to the court when the application for default judgment was heard on 6 May 2021. The applicant seeks that the default judgment be rescinded to afford it an opportunity to demonstrate that the business rescue practitioners intended to include all forms of security, including a guarantee under the definition of surety. The applicant submits that the respondent sought judgment on a fatally defective, non-existent cause of action and the court handed down an erroneous judgment on 6 May 2021.

[17] Of importance is the fact that the applicant concedes in the founding affidavit that the guarantee, as relied upon by the respondent, is to be regarded as a primary obligation, and that it therefore stands separate from the loan agreement between Chrome and the respondent. During argument counsel submitted that the guarantee is accessory to the loan agreement.

[18] The business rescue plan does not specifically include 'guarantee' in the definition of 'surety creditors'. The applicant, however, submits that the intention of the business rescue practitioners was clearly to include surety and guarantor the heading 'surety'. Should this court not accept this proposition, the dispute would best be dealt with in the trial court in order to afford them the opportunity to lead the business rescue practitioner's evidence as to what they meant to be included under

the term 'surety creditors'. The applicant's view regarding the business practitioner's intention is not supported by confirmatory affidavits.

Miscellaneous

[19] The applicant, in his founding affidavit, amongst others, takes issue with the particulars of claim, in that the defendant, despite placing reliance on the guarantee, failed to plead the content and provisions of the guarantee. It was also not certified by an attorney with right of appearance in the High Court. In addition, the applicant avers that the 'Confirmation of Balance Outstanding' was patently incorrect in that it did not reflect the dividend already paid to the respondent, and the respondent did not comply with the provisions of the National Credit Act, 34 of 2005. These aspects were not elaborated on in the heads of argument or when oral submissions were made. The respondent indicates, however, in its answering affidavit that the payment received was disclosed to the court when default judgment was granted, and it was reflected in the updated statement placed before the Court, that the guarantee formed part of the annexures to the particulars of claim and that the summons was properly signed by an attorney with right of appearance. Judgment was granted for a lesser amount than what was initially claimed in the summons. The parties did not indicate in the joint practice note that the issues referred to in this paragraph need determination. It is specifically stated therein that the issue of the National Credit Act's applicability will not be raised. I consequently do not deal with these issues in this judgment.

The respondent's opposition

[20] The respondent contends that, as stated in the particulars of claim, it instituted action against the applicant on the strength of a written guarantee given by the applicant to the respondent for Chrome's 'secured obligations'. The terms of the business rescue plan relied on by the applicant, was neither negotiated nor agreed to by the respondent. The respondent voted against the plan - this is common cause. The business rescue proceedings and the adoption of the business rescue plan do not affect the respondent's claim against the applicant as it does not affect the personal

liability of the respondent as director in terms of the guarantee. The position may have been different if the respondent voted in favour of the plan. The business rescue plan speaks of 'surety creditors' and the respondent denies that it is surety creditor or that it agreed to receive any payments as an alleged 'surety creditor'.

[21] The respondent avers that its rights under the guarantee constitutes 'property' to hold that the applicant is free from his obligations under the guarantee because of the adoption of the business rescue plan, would be to deprive the respondent from pursuing a debt owed by the applicant because of a vote forced upon the respondent by the holders of the majority of the creditor's voting interests in terms of the Act and to the detriment of the respondent who voted against the plan. The respondent cannot be unlawfully deprived of his property in this manner. The terms of the business rescue plan are only binding upon the applicant and each of the company's creditors thereunder. It is not a contract between the applicant and the respondent. The respondent did not agree to the terms relied on by the applicant. In any event, the business rescue plan is silent about the guarantee.

[22] Counsel for the respondent submitted that the guarantee granted by the applicant is a demand guarantee and not a suretyship. As such, it is independent of the underlying contract which gave rise to the guarantee. It must be paid on demand, regardless of the dispute between the parties in the underlying contract, and regardless of what may be provided for in the business rescue plan. Counsel relied on and referred the court to the recent decision of the Supreme Court of Appeal in *Van Zyl v Auto Commodities (Pty) Ltd.*[5]

Discussion

[23] The respondent correctly identifies the relevant question to be addressed as whether the terms of the business rescue plan absolved the applicant from personal liability towards the respondent under the guarantee, based on the provisions of s 154(2) of the Companies Act, 71 of 2008. The s 154(2) defence is a crisp question of law

[5] [2021] 3 All SA 395 (SCA).

which can be determined by this court in order to establish whether the applicant has a *bona fide* defence to the respondent's claim.

[24] The distinction between a suretyship and a demand guarantee needs to be stated at the onset. It is trite that a suretyship is an accessory contract in terms of which the surety undertakes to the creditor of the principal debtor, that if and in so far as the principal debtor, who remains bound, fails to perform the principal obligation, the surety will perform it.[6] In *State Bank of India and Another v Denel Soc Ltd and Others*[7] the Supreme Court of Appeal held that a demand guarantee is independent of the underlying contract which gives rise to the guarantee. This decision reaffirmed the position as stated in *List v Jungers*[8] where the court held that the word 'guarantee' in a document should not be looked at in isolation when its meaning is determined. The court distinguished between a suretyship and an undertaking, the latter being an original and unqualified undertaking to pay money to the creditor by a certain date. After considering the use of the word in its context, Diemont JA said 'There is no suggestion that it is an accessory contract or that it is an undertaking that the principal debtor ... will perform his obligations.'

[25] From the guarantee attached as POC2 to the particulars of claim the following is, amongst others, evident:

i. The applicant, the guarantor, concluded the agreement with the respondent;
ii. The debtor means the client as defined in the loan agreement thus, Chrome;
iii. 'Secured obligations' means any and all indebtedness or obligations of any nature whatsoever of the debtor to the creditor from time to time in terms of the loan agreement or from any other cause, including in respect of the principal amount, interest, costs, expenses, fees and the like;
iv. The guarantor agreed to guarantee the due and punctual performance by the debtor of the secured obligations as a primary obligation and undertook to

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[6] Du Bois F *et al.* Wille's Principles of South African Law, JUTA, 9th ed, 1018; Locke N & Van der Linde K, Business Rescue and the Fate of Accessory Security Rights, 2018 J.S. Afr.L. 839-856, 839.

[7] [2015] 2 ALL SA 152 (SCA).

[8] 1979 (3) SA 106 (A).

pay the creditor on first written demand all sums due and payable or incurred by the debtor to the creditor pursuant to the secured obligations;

v. The guarantee does not constitute a suretyship;

vi. The obligations of the guarantor under this guarantee is not affected by any act, omission, matter or thing which, but for this clause 6, would reduce, release or prejudice any of its obligations under this guarantee (without limitation and whether or not known to the guarantor and/or the creditor) including:

a) Any insolvency, liquidation, winding-up, business rescue or similar proceedings (including, but not limited to, receipt of any distribution made under or in connection with those proceedings);

b) Any other fact or circumstances arising on which the guarantor might otherwise be able to rely on a defence based on prejudice, waiver or estoppel.

vii. If any payment by the guarantor is avoided or reduced for any reason (including, without limitation, as a result of insolvency, business rescue proceedings, liquidation, winding-up or otherwise):

a) the liability of the guarantor hereunder shall continue as the payment, discharge, avoidance, or reduction had not occurred; and

b) the creditor shall be entitled to recover the value or amount of that security or payment from the guarantor, as if the payment, discharge avoidance or reduction had not occurred.

viii. The guarantor acknowledged and agreed that his obligations under this agreement are absolute and, without in any way limiting or derogating from any other provisions of the agreement, the guarantor shall on the signature date be, and shall remain bound to the full extent of this agreement, which shall at all times be fully and immediately enforceable in accordance with its terms, notwithstanding –

a) any insolvency, business rescue, administration, judicial management, reorganisation, arrangement, readjustment of debt, dissolution, liquidation or similar proceedings by or against the creditor, the debtor and/or the guarantee;

b) any variation or novation of the secured obligations, whether by agreement, operation of law or otherwise;

c) any other cause which, but for this clause, would or might have the effect of terminating, discharging or in any other manner whatsoever affecting the guarantor's obligations under this agreement or any of the rights, powers or remedies conferred upon the creditor by law.

[26] After considering POC2 to the particulars of claim, and the context within which the term 'guarantee' is used, it is evident that it was not used in the sense of an undertaking to stand surety for Chrome's obligation. The guarantee constitutes an independent obligation that exists by virtue of its own merits. I agree with the respondent's view that the guarantee granted by the applicant is a demand guarantee and not a suretyship.

[27] The respondent's claim against Chrome cannot be described as a 'debt owed by the company'. The obligation befell the applicant as guarantor in his personal capacity. This leads to the question as to whether the applicant's 'section 154(2)' – defence *prima facie* has some prospect of success. Section 154(2) of the Companies Act, 71 of 2008, provides as follows:

> '(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.'

[28] The Supreme Court of Appeal recently in *Van Zyl v Auto Commodities (Pty) Ltd,*[9] interpreted s 154(2). The Supreme Court of Appeal concluded:

> '... [S]ection 154(2) does no more than preclude creditors from pursuing claims against the company after the business rescue plan has been

[9] 2021 (5) SA 171 (SCA).

implemented. It does not affect or extinguish the liability of a surety for the debt. It is unnecessary to consider whether or how the terms of the business rescue plan could provide otherwise.'

[29] In the matter before me, the business rescue plan does not mention claims by creditors against guarantors. The distinct differences between a suretyship and a guarantee militate against a finding that because the business rescue practioners' intention allegedly was to include the respondent's claim under the broad umbrella of surety creditors, that the respondent's guarantee was in a chameleonic fashion converted to a suretyship.

[30] If the nature of a guarantee as an independent primary obligation is considered, it follows that the adoption of a business rescue plan to which the creditor did not agree, cannot extinguish the obligation between the guarantor and the creditor. To hold otherwise, would be to negate the separate legal personality of the company subject to business rescue proceedings. Business rescue proceedings are aimed at restructuring the affairs of a company in such a way that either maximises the likelihood of the company continuing in existence on a solvent basis or results in a better return for the creditors of the company than would ordinarily result from the liquidation of the company. It is not to absolve directors who concluded guarantees from liability. Circumstances may arise where a business rescue practitioner and a creditor may engage in negotiations and expressly agree that the director's liability towards the creditor is confined to the terms set out in the business rescue plan. Where, however, a guarantor concluded an agreement in the terms referred to above, where the guarantor's liability is expressly agreed to remain intact even when business rescue proceedings commence, and the parties explicitly agree that 'no addition to or variation, delegation, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties', a creditor cannot be deemed to have denounced the benefits it is entitled to in terms of a guarantee if it voted against the adoption of the business rescue plan, merely because the business rescue plan was adopted by the majority of creditors. I agree with counsel for the respondent, who submitted with reliance on *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and*

Others[10] that *pacta sunt servanda* continues to play a crucial role in the judicial control of contract through the instrument of public policy, as it gives expression to central constitutional values, and contributes to commercial certainty.

[31] In the absence of any allegation or suggestion on the papers that the respondent and the applicant or the business rescue practitioners negotiated or agreed to the inclusion of clause 12.3.5 of the plan, and due to the fact that the respondent voted against the adoption of the business rescue plan, clause 12.3.5 is legally unenforceable against the respondent. Due to the effect of s 154(2) the respondent's right to enforce his claim against Chrome is confined to the terms of the business rescue plan, but the applicant's liability towards the respondent remains unaffected.

[32] In light of the above the applicant's section 154(2)-defence is not a *bona fide* defence to the plaintiff's claim which prima facie has some prospect of success. Consequently, none of what the applicant submits constitutes a fact or facts which would have precluded Collis J from granting default judgment.

ORDER

In the result, the following order is granted:

1. The application for rescission of the default judgment granted on 6 May 2021 is dismissed with costs, inclusive of the costs of two counsel.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 8 March 2022.

Counsel for the applicant:	Adv. C Zietsman
Instructed by:	Du Plessis Phukubye Smith Attorneys

[10] 2020 (5) SA 247 (CC) para 83.

For the respondent:	Adv. Y Coertzen
With:	Adv. G L Kasselman
Instructed by:	MacIntosh Cross & Farquharson
Date of the hearing:	28 February 2022
Date of judgment:	8 March 2022