THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 279/2020

In the matter between:

MARTIN VAN ZYL **APPELLANT**

and

AUTO COMMODITIES (PTY) LTD **RESPONDENT**

Neutral citation: *Van Zyl v Auto Commodities (Pty) Ltd* (279/2020) [2021] ZASCA 67 (3 June 2021)

Coram: WALLIS, MBHA and SCHIPPERS JJA and PHATSHOANE and ROGERS AJJA

Heard: 18 May 2021

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Summary: Business rescue – effect on liability of surety – interpretation of s 154 of Companies Act 71 of 2008 – deed of suretyship – interpretation – liability of surety thereunder.

ORDER

On appeal from: Northern Cape Division of High Court, Kimberley (Coetzee AJ, sitting at first instance)

The appeal is dismissed with costs.

JUDGMENT

Wallis JA and Rogers AJA (Mbha and Schippers JJA and Phatshoane AJA concurring)

[1] The appellant, Mr van Zyl, was formerly the Chief Executive Officer of Blue Chip Mining and Drilling (Pty) Ltd (BCM). The respondent, Auto Commodities (Pty) Ltd (Auto Commodities) supplied BCM with petroleum products on credit, but required Mr van Zyl to bind himself as surety for its resulting liabilities, which he did in July 2014. Thereafter BCM fell on hard times and on 10 December 2014 it was placed under business rescue. A business rescue plan was proposed and adopted on 2 June 2015 and implemented, with Auto Commodities receiving two dividends totalling nearly R1.9 million in December 2015 and December 2016 respectively. The business rescue terminated on 31 January 2017 as a result of the substantial implementation of the plan. On 21 July 2017 Auto Commodities issued summons against Mr van Zyl for an amount in excess of R6 million being the shortfall in regard to BCM's original indebtedness. Its claim was based upon the deed of suretyship. After a trial, the claim succeeded before Coetzee AJ in the Northern Cape Division of the High Court, Kimberley and he granted leave to appeal to this court.

[2] Although Mr van Zyl originally raised other defences, the only issue remaining in dispute between the parties is whether he is liable under the deed of suretyship to pay the amount claimed by Auto Commodities. His contention was that, when BCM's business rescue was terminated, s 154(2) of the Companies Act 71 of 2008 (the Act) released BCM from any further indebtedness to Auto Commodities. He submitted that this in turn released him from liability because suretyship is an accessory obligation. In argument, the parties focussed on the perceived differences between the judgment in *Tuning Fork*[1] and an *obiter dictum* in *New Port*.[2] However, as a second string to its bow Auto Commodities contended that the terms of the deed of suretyship were in any event wide enough to maintain Mr van Zyl's liability whatever the effect of s 154(2) on BCM's liability to Auto Commodities.

The deed of suretyship

[3] A business rescue plan must be read in the light of the provisions of the Act governing the consequences of such a plan being adopted and implemented. Under s 152(4) of the Act, the plan is binding on both the company and its creditors, but the only provision dealing expressly with the consequences of implementing the plan are the provisions of s 154. The business rescue plan is framed somewhat imprecisely in regard to these consequences. As required by s 150(2)(b)(ii), clause 7.2 of the business rescue plan dealt with the extent to which the company was to be released from payment of its debts. Clause 7.2.5 said:

'The BRPs[3] are of the view that the controlled winding down of the Company's affairs and the successful finalisation of Proceedings will only be achieved upon adoption of this Business

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[1] *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* 2014 (4) SA 521 (WCC).
[2] *New Port Finance Co (Pty) Ltd and Another v Nedbank Limited* [2014] ZASCA 210; 2016 (5) SA 503 (SCA) para 14.
[3] An acronym for 'business rescue practitioners'.

Rescue Plan in terms of which the Company will be released from the payment of some of its debts.'

It is unclear from this language whether the BRPs had in mind anything more than the statutory inability of the creditors to enforce claims against the company after the implementation of the plan, but for present purposes we will assume in favour of Mr van Zyl that it meant the discharge of BCM's debt to Auto Commodities.

[4] Although a principal debtor’s discharge from liability ordinarily releases the debtor’s surety, the accessory nature of a surety’s liability is not so rigidly applied in our law as to preclude some derogation by way of agreement between the creditor and the surety. In addition to customary terms whereby Mr van Zyl assumed liability as a surety and co-principal debtor and renounced the benefit of excussion, the suretyship contained several such unobjectionable provisions which, in varying formulations, are fairly standard in commercial practice.

[5] Clause 3 provided that Auto Commodities was at liberty ‘to extend any leniency or extension of time to, or compound or make such other arrangements with, [BCM]’, 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 us or any of us hereunder.’ Clause 5 listed various provisions which would apply in the event of the ‘insolvency, liquidation, sequestration, assignment or placing under judicial management of’ BCM’s estate or in the event of ‘compromise between [BCM] and any creditor of [BCM]’. One such listed provision (clause 5.4) was that no dividends or payments which Auto Commodities received from BCM in one or other of these eventualities would prejudice Auto Commodities’ ‘right to recover from us … to the full extent of this Suretyship, any sum which, after the receipt of such dividends or payments, will remain owing to [Auto Commodities] by [BCM]’.

[6] In *New Port*, where sureties raised a defence similar to that of Mr van Zyl in the present case, after summarising a provision akin to clause 5.4, it was said:[4]

‘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.’

Counsel for Mr van Zyl submitted that clause 5.4 was distinguishable from the clause dealt with in *New Port*, because the surety was only liable for any balance which, after receipt of dividends or payments, remained owing to Auto Commodities ‘by the debtor’, that is, by BCM. He submitted that in this case the discharge of BCM from liability meant there was no longer any amount owing 'by the debtor'. However, on checking it transpired that the clause in *New Port* contained the same phraseology as clause 5.4. The reference to the balance owing ‘by the debtor’ was understood there to mean no more than the outstanding balance of the principal debt, that is, the balance which the principal debtor had not paid.

[7] This interpretation was clearly correct, and is equally applicable to clause 5.4. Clause 5 contemplates a compromise between the debtor and one or more of its creditors. A compromise typically involves a discharge of the unpaid balance. Another circumstance is liquidation. A liquidation, upon completion, culminates in the company’s dissolution, at which point there would no longer be a principal debtor.[5] Clause 5.4 nevertheless envisages that in such circumstances there would be an unpaid balance for which the surety would remain liable.[6]

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[4] Para 12.

[5] Section 419 of the Companies Act 61 of 1973 read with Item 9 of Schedule 5 to the Companies Act 71 of 2008. *Pieters NO v Absa Bank Ltd* [2019] ZASCA 118; 2021 (3) SA 162 (SCA).

[6] This would be so in any event as the death of the insolvent or dissolution of the company does not discharge the surety. *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 633H-634A.

[8] Clause 3 provides a further basis for arriving at the same conclusion. The clause entitles Auto Commodities to 'compound' with BCM on the basis that such compounding will not affect or operate as an abandonment of its rights against Mr van Zyl. In the context of relations between creditors and a debtor, the ordinary meaning of 'compound with' is 'to enter into a composition with', typically through an arrangement between one or more creditors and the debtor in terms whereof the creditors agree to accept less than their full claims (often expressed as so many cents in the rand) in satisfaction of the debtor's indebtedness to them.[7] A surety may agree with the creditor to remain liable in the event of a composition, even though the composition may put it beyond the creditor's power to give the surety a cession of action or right of recourse against the debtor.[8]

[9] Under the business rescue plan in this case BCM's creditors were to receive a dividend depending upon the amount realised by the controlled winding down of its affairs and in accordance with a stated order of preference. Thereafter the company was to be restored to its shareholders. The plan contemplated that the creditors would not be entitled to pursue the company in respect of the balance of their claims. Even assuming this had the effect of discharging BCM from liability to Auto Commodities, the latter's rights under the suretyship were, by virtue of clauses 5.4 and 3, unaffected and, whether or not it supported the business rescue plan, it did not operate as an abandonment of its claim against Mr van Zyl.

[10] The appeal could have been dismissed on these points alone without addressing Mr van Zyl's legal argument, although strictly speaking the legal point is antecedent to the issue of construction of the deed. However, the trial judge

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[7] *Osche v Van Aardt* 1924 OPD 265 at 271-2; *Vlachos and Another v Supermeats Mtuba (Pty) Ltd and Others* 1968 (4) SA 35 (D) at 41H-42C.

[8] *Standard Bank of SA Ltd v Lewis* 1922 TPD 285 at 291; *Ottawa Rhodesia (Pvt) Ltd v Burger* 1975 (1) SA 462 (R) at 463A-D.

was asked for and gave leave to appeal on the basis of the legal point and the argument focussed on it. Its proper determination is a matter of importance in regard to the effect of a business rescue plan being implemented. We have been referred to no less than seven judgments in various divisions of the high court dealing with *Tuning Fork* and *New Port*. There is a measure of confusion in textbooks and academic articles concerning the impact of an approved and implemented business rescue plan.[9] Our own researches have uncovered four LLM dissertations[10] discussing the two cases and the effect of s 154 of the Act. Leaving the issue unresolved when it is ripe for decision is undesirable, as that can only lead to further litigation in the high court and, in due course, the matter returning to this court. It is therefore appropriate for us to grasp the nettle.[11]

The general principle

[11] 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 obligations under it. Subject to any specific limitation, such as a suretyship in a limited amount, the surety's obligations are coterminous with those of the principal debtor. Where the surety signs as co-principal debtor, as Mr van Zyl did, the addition of those words shows that the surety is assuming the same obligations as the principal debtor. In other words, the obligation of the surety is the same as that of the principal debtor.[12] It follows from the accessory nature of the surety's undertaking that the liability of the surety is dependent on the obligations of the principal debtor.[13]

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[9] P Delport et al *Henochsberg on the Companies Act 71 of 2008* (Loose-leaf updated to October 2020) 550-14 to 550-22; Natania Locke and Kathleen van der Linde 'Business rescue and the fate of accessory security rights' 2018 *TSAR* 839 para 6 at 844-846;
[10] At four different universities viz University of Cape Town, University of Johannesburg, University of KwaZulu-Natal and University of South Africa.
[11] C/f *Administrator Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 825 (A) at 831B-C.
[12] *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609(A) at 622H-623H.
[13] *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA ()A at 470C-D.

[12] 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.[14] If the principal debtor's obligation is reduced by compromise the surety's obligation is likewise reduced. If the principal debtor is afforded time to pay that enures for the benefit of the surety.[15] If the claim against the principal debtor prescribes so does the claim against the surety.[16] This will be subject to any terms of the deed of suretyship that preserve the surety's liability notwithstanding the release or discharge of, or any other benefit or remission afforded to, the principal debtor.

The pleaded case

[13] The starting point for Mr van Zyl's argument was s 154 of the Act. It reads:

'**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 a 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.'

[14] The defence relied on s 154(2) and not s 154(1). There was no allegation, as would be required if reliance was being placed on s 154(1), that the business rescue plan provided for BCM to be released from its obligation to pay its debt to Auto Commodities, or that Auto Commodities acceded to the discharge of that debt in whole or in part. Section 154(1) was therefore not relevant. Section 154(2) is directed at the consequences of the approval and implementation of the business rescue plan for the enforcement by creditors of any debt that existed

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[14] *Moti and Co v Cassim's Trustee* 1924 AD 720.

[15] *Tuning Fork* paras 46 to 49 and the authorities there cited.

[16] *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA).

prior to the beginning of the business rescue process. It provides that the creditor will not be able to enforce the debt 'except to the extent provided for in the business rescue plan'. The plea read:

'6.3.1 the business rescue plan was implemented;

6.3.2 the business rescue practitioners filed a certificate of substantial implementation of the business rescue plan in terms of Section 152(8) of the Companies Act, 2008 ("the Act");

6.3.3 in terms of Section 154(2) of the Act, the Plaintiff can no longer enforce any debt which was owing prior to the business rescue by the debtor ("the statutory compromise');

6.3.4 as a result of the statutory compromise, the debtor [BCM] does not owe anything to the Plaintiff;

6.3.5 no accessory obligation survives the statutory compromise.' (Our insertion.)

[15] The pleader chose to describe the adoption and implementation of the business rescue plan as 'the statutory compromise', but that was potentially misleading. Compromises and arrangements between a company and its creditors are dealt with in s 155 of the Act and may become binding on creditors as a result of being sanctioned by the court in terms of s 155(7) of the Act. There is a significant difference between this section and its predecessor, s 311 of the Companies Act 61 of 1973 (the 1973 Act), which provided for compromises and arrangements between companies and both their creditors and their members, but the essence of a compromise or arrangement remains unchanged. An arrangement can be of the widest character.[17] Not every compromise or arrangement involves a reduction of, or discharge, complete or partial, of existing indebtedness. Under the 1973 Act it was commonplace for such arrangements to involve a person acquiring the shares of the company and taking cession of all its debts against a payment to the creditors external to the company.[18] In order to bring them within the section the ceded claims might be reduced by a nominal R1, although whether this was necessary is debatable.

[17] *Du Preez v Garber; In re Die Boerebank Bpk* 1963 (1) SA 806 (W) at 813 per Trollip J.
[18] See the discussion of section 311 in Justice B Galgut (consulting editor), J A Kunst et al (editors) *Henochsberg on the Companies Act 61 of 1973* (Loose-leaf, 5 ed, last update 2011) p 600 et seq. especially at 602-3.

[16] The submission, adoption and implementation of a business rescue plan affords, if anything, even wider latitude to the parties involved, being the business rescue practitioners, creditors, other affected persons (which includes shareholders, trade unions and employees),[19] and management. It may in some circumstances be similar to a compromise or arrangement under s 155, or it may, as in this case, resemble a winding-up of the company.[20] In some circumstances it may involve a true compromise of a claim by the deliberate discharge of all or part of it, and in others – of which this is again an example – it involves the payment of a dividend after realisation of such assets as the company possesses, as an alternative to a formal winding-up. It is undesirable and potentially confusing for the outcome of a business rescue plan to be described in the nomenclature of something that, whatever similarities may occasionally exist, is a different statutory creature.

[17] All three of the propositions advanced in the plea are questionable. As to the first, it is not correct that the plaintiff can no longer enforce any debt which was owing to the creditor by BCM prior to the business rescue. That is not what s 154(2) says. It qualifies the inability to enforce the debt with the words 'except to the extent provided for in the business rescue plan'. The section does not exclude enforcement of the whole debt, but restricts it to the benefits provided for in the business rescue plan. It is perfectly possible for creditors to be paid in full under a business rescue plan, which involves no compromise at all. An example would be a secured creditor paid in full from the realisation of its security or a preferred creditor, such as SARS or employees, being paid in full from the general proceeds under the plan. If only a portion of a debt is paid the balance may not be enforced by the creditor. The first proposition is too widely stated.

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[19] See the definition of 'affected person' in s 128(1) of the Act.
[20] See sub-sec (iii) of the definition of 'business rescue' in s 128(1) of the Act.

[18] The second proposition disregards the wording of s 154(2). Firstly, it does not say that as a result of the approval and implementation of the business rescue plan, the debtor, in this case BCM, 'does not owe anything' to the creditor, in this case Auto Commodities. It says that the creditor cannot enforce the debt that the debtor owed to it when business rescue commenced, except to the extent provided for in the business rescue plan. This does not necessarily mean that BCM no longer owes anything to Auto Commodities. That would only be so if, as a matter of interpretation of s 154(2), the inability to enforce the debt beyond the stipulated limit also discharged the debt. Secondly, unlike the requirement in s 154(1) that the creditor accede to the plan, s 154(2) operates against the creditor even if they fought tooth and nail against the adoption of the business rescue plan.

[19] The third proposition is dependent on the correctness of the second. It is only if BCM no longer owes anything to Auto Commodities that the accessory obligation of Mr van Zyl as surety has been discharged. But the mere fact that Auto Commodities may not enforce BCM's indebtedness beyond what is provided in the business rescue plan does not inevitably carry with it that result.

Section 154

[20] The argument addressed to us exposed the fact that ss 154(1) and 154(2) are directed at fundamentally different situations and have very different consequences. This became apparent from an analysis of the language of the two. Both subsections have the end-result that a creditor loses the right, as against the company, to enforce the debt or part of it, but the section draws a distinction between the situation of a creditor who has ‘acceded to the discharge’ of some or all of the debt (subsection (1)) and creditors in general (subsection (2)). In the case of subsection (2), creditors – whether they have ‘acceded’ to the arrangement or not – cannot enforce their claims against the company except to the extent provided for in the plan. A statutory bar against enforcement in terms of

subsection (2) does not necessarily mean that the company is discharged – it may be a defence *in personam* rather than a defence *in rem*.[21] Subsection (1) expressly refers to the discharge of some or all of a debt, and requires – in order for the subsection to be operative – that the creditor should have 'acceded' to such discharge.

[21] The analysis also demonstrated that the fault line between the judgment in *Tuning Fork* and the dictum in *New Port* was narrower than it had been perceived to be. On reflection, whilst this may disappoint academic commentators, we see little profit in analysing the basis of the judgment in *Tuning Fork* or the *dictum* in *New Port.* We have had fuller argument on the proper construction of s 154 of the Act in this case than was addressed in those cases. This has demonstrated that the proper interpretation and application of that section lay at the heart of the determination of the legal issue raised by Mr van Zyl. It should have played a greater role in deciding *Tuning Fork* and in the wording of the *dictum* in *New Port*. But having said that, and to the extent necessary acknowledged our role in the shortcomings in those judgments, it will be more helpful to readers of this judgment and those who have to engage in the day-to-day business of business rescue for us to analyse the section and set out our conclusions. Before doing so we record that undertaking that analysis has not caused us to doubt the correctness of the decision in *Tuning Fork* in the light of the facts in that case and the arguments addressed to the court. We turn then to consider the two sub-sections of s 154 separately.

[21] *Tuning Fork* paras 34 and 47-48, referring to *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) (particularly para 34).

Section 154(1)

[22] The sub-section commences by saying that a business rescue plan 'may provide' that if it is implemented in accordance with its terms, a creditor who has 'acceded' to the discharge of the whole or part of a debt owing to it, will lose the right to enforce the relevant debt. The permissive language, and the fact that it is concerned with the terms that may be included in a business rescue plan, are consistent with it being in the first instance an empowering provision enabling the business rescue plan to contain a provision that operates to discharge the company's indebtedness to particular creditors. Seen in that light it reinforces the provision in s150(2)(*b*)(ii) of the Act that 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 debts.

[23] 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 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.

[24] It is unclear what is required for a creditor to 'accede' to the discharge of the debt. Does it mean that they must have agreed to it? If so, is the agreement constituted by voting in support of the plan, or merely by accepting the benefits under the plan, or in some other way? The answers to these questions are by no means clear-cut. The most obvious way for a creditor to ‘accede’ to the discharge of a part or all of the company’s indebtedness would be by voting in favour of a business rescue plan providing for such discharge. We need not explore whether there are other ways in which such accession might take place. We are inclined

to agree with Gorven J in *D H Brothers*[22] that the section contemplates a discharge brought about by the voluntary action of the creditor, or consented to by way of an overt act, rather than a compulsory deprivation of rights against the company. That approach would be consistent with the principle that legislation is not ordinarily to be construed as depriving people of their existing rights.[23] It would also be consistent with the constitutional protection against the deprivation of property.[24]

[25] On that approach to s 154(1), if the creditor acceded, or consented, to the company being discharged from its debt, the application of ordinary principles of suretyship has the effect that the surety would likewise be discharged. That accords with the general principle that the liability of the surety is accessory to that of the principal debtor so that the discharge of the latter serves to discharge the former.[25] There is no inequity in such an approach. 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.

[26] It is unnecessary to analyse s 154(1) any further because it had no application in the circumstances of the present case. The structure of the Act is that any proposed release of the company of its debts must be reflected in the business rescue plan. Thereafter, if the plan providing for such a release is approved and a creditor accedes to it, in terms of s 154(1) the creditor will lose the right to enforce the relevant debt. The 'release' proposed and acceded to discharges the debt. The discharge of the debt and its unenforceability by the

[22] *DH Brothers Industries (Pty) Ltd v Gribnitz NO and others* 2014 (1) SA 103 (KZP) para 67.
[23] *Millman NO v Twiggs and Another* 1995 (3) SA 674 (A) at 679B-C.
[24] Constitution, s 25.
[25] See *Tuning Fork* paras 49 to 53.

creditor go hand in hand. This is not quite as emphatic language as the word 'extinguished' in s 10(1) of the Prescription Act 68 of 1969, but it seems to have the same effect, namely, that the debt ceases to exist.

[27] We interpose here that *Tuning Fork* (an application for summary judgment) was argued and decided on the basis that the company's indebtedness to the creditor had been discharged upon implementation of a business rescue plan providing for the payment of specified dividends in full and final settlement of claims, thereby discharging the principal debtor. If, as in the present case, the argument in *Tuning Fork* had focused on s 154, it would have been appreciated that the effectiveness of such discharge depended on the further question whether the creditor had acceded to the discharge within the meaning of s 154(1). However, since the court assumed in favour of the defendant that the plaintiff had voted in favour of the plan,[26] this would not have affected the outcome.

Section 154(2)

[28] As with all statutory provisions, the starting point in regard to s 154(2) is the words of the section and the meaning that they bear on the application of well-established principles of statutory interpretation. The question that immediately presents itself is what is meant by saying that the creditor 'is not entitled to enforce the debt' to any extent beyond that provided by the business rescue plan. Mr van Zyl's submits that it means that to that extent the debt is discharged and no longer exists. The alternative construction suggested in the *dictum* in *New Port* was that it prevented enforcement of the debt against the company, but went no further. In other words, it provides a defence that is personal to the company, without discharging the debt itself.

[26] *Tuning Fork* para 13.

[29] There is a contrast between the language used in s 154(1) and that in s 154(2). The former speaks of the discharge of the debt, while the latter merely places a limit on the ambit of the enforcement of the debt. Under the one section the debt clearly no longer exists. Under the other the debt exists, but is enforceable only to a limited extent. Drawing this distinction makes sense of the heading to the section, which is: 'Discharge of debts and claims.' If both sub-sections result in the discharge of the company's debts, the reference to the discharge of claims is redundant. However, if s 154(1) is treated as the provision that results in the discharge of debts, and s 154(2) as being concerned with discharge of claims as a convenient shorthand for the non-enforcement of claims, this makes sense of the heading. The distinction drawn between the discharge of debts and the discharge of claims suggests a difference in meaning and effect between the two sub-sections.

[30] An inability to enforce a debt is not necessarily an indication that the debt has been discharged. Section 3(1) of the Prescription Act 18 of 1943 provided that:

'Extinctive prescription is the rendering unenforceable of a right by the lapse of time.'

That is in stark contrast to the provisions of the 1969 Act referred to in para 26, which provide that a debt is 'extinguished' by prescription. That the change from the one to the other was deliberate cannot be doubted in the light of the memorandum by Professor J C de Wet, who drafted the 1969 Act, in which he explained that this was the purpose of the new statute. He drew a clear distinction between strong prescription under the new Act and weak prescription under the old.[27] Under the 1943 Act while the debt was rendered unenforceable by prescription it was not extinguished and did not cease to exist. It could, for

[27] J J Gauntlett (ed) *Opuscula Miscellanea: Regsgeleerde Lesing en Adviese van J C de Wet*' (Butterworths, 1999), 77-114. This is the memorandum he prepared for the South African Law Commission on prescription. He also drafted the 1969 Act, which was enacted in the terms he had drafted.

example, be set off against a debt owed by the creditor to the debtor and arising after the lapse of the period of prescription and could support a contract of suretyship.[28]

[31] 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 right to pursue the surety remains extant. In *Wides v Butcher*[29] 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. The effect of such reservation is to preserve the surety's right of recourse against the debtor in respect of any amount that it is obliged to pay to the creditor. The discharge is then a *pactum non petendo* and is purely personal to the debtor and does not avail the surety[30]. It is unnecessary for the surety to be a party to any such reservation, because it does not affect the surety's obligations. It remains in the same position in relation to both the creditor and the debtor as it was before the conclusion of the discharge agreement. Whether the discharge agreement contains such a reservation is a matter of construction of the agreement.

[32] Counsel for the appellant argued, with reference to old authority, that a perpetual *pactum de non petendo*, that is, an undertaking in perpetuity by the creditor in favour of the debtor not to sue for enforcement of the debt, operates as a release discharging the surety,[31] but that is by no means invariably so,[32] and the question is whether this is the proper interpretation of s 154(2). In order not to

[28] Section 3(5) of the Prescription Act 18 of 1943.
[29] *Wides BL and JL v S Butcher and Sons* (1905) 26 NLR 567 at 584-5.
[30] CF Forsyth and JT Pretorius *Caney's The Law of Suretyship in South Africa* (Juta 6 ed, 2010) 188-189.
[31] Wessels *The Law of Contract in South Africa* 2 ed §§ 4039, 4237-4242 and the old authorities there cited
[32] See, eg, *BOE Bank Ltd v Bassage* [2006] ZASCA 50; 2006 (5) SA 33 (SCA) para 9. See also *Tuning Fork* paras 43(iv), 49 and 52.

render either subsection redundant, one must interpret them as having different legal consequences. The distinction which the language of the section supports is a distinction between the discharge of a debt (subsection (1)) and a personal protection in favour of company against enforcement of a debt (subsection (2)). And since the practical effect, as between the creditor and the company, is the same, namely that the creditor cannot enforce the claim beyond the extent permitted by the plan, the change in wording in subsection 2 is indicative of the legislative distinction having been drawn principally, although not necessarily solely, with claims against sureties in mind.[33]

[33] *Wides v Butcher* has not been departed from.[34] The material portion of the judgment of Dove-Wilson J clearly sets out the position. It reads:

'…[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 exists that if you liberate the principal debtor, you mean to liberate 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 to say so, then the surety is not discharged.*' (Our emphasis.)

[34] The business rescue plan in this case does not mention claims by creditors against sureties, or the exercise of rights of recourse by sureties against the

[33] An approach that held the debt to be discharged in its entirety under s 154(2) would affect the validity of surety mortgage bonds. It would also affect pledges of movables given by third parties and, in the case of a ship's crew, their maritime lien over the vessel on which they were employed.

[34] CF Forsyth and JT Pretorius *Caney's The Law of Suretyship in South Africa* (Juta 6 ed, 2010) 195, fn 59. LAWSA, Vol 26 (2 ed replacement, by JJ Henning and KL Mould, 2015) para 306 says in general that: 'If the principal debt is not extinguished but becomes unenforceable the position of the surety is not affected, that is, he or she remains bound and his or her own debt remains enforceable against him or her.'

company. Given that s 154(2) is also silent on this issue, it is difficult to see on what basis the debtor (BCM) could contend that the statutory inability to sue the company was inconsistent with the continued existence of a right of recourse against it by the surety. The section says nothing of the sort, so that it could only arise by necessary implication from the terms of the discharge, but absent any special provision in the business rescue plan itself there is no basis for reading such a provision into s 154(2).[35]

[35] If the whole or a part of the debts of a company become unenforceable as a result of the adoption and implementation of a business rescue plan, the fact that some creditors may pursue the balance of their claims against sureties, who will have a right of recourse against the company, does not negate the purpose of business rescue. If, as occurred in *New Port*, the creditor has obtained judgment against the surety and been paid, the surety's claim will ordinarily stand on the same footing as that of the creditor that has been paid and have no greater impact on business rescue. If the surety is closely connected to the company, as is frequently the case, and the company resumes trading, the surety may be content for commercial and tax reasons to remain as a creditor while the company's fortunes are restored. They may even be willing to subordinate their claim to those of other creditors if that will bring the business back to life. Other scenarios can be imagined. The company will usually be aware, or its records will show, which creditors are secured by sureties and, if the position of the surety is relevant to a successful business rescue, the business rescue practitioners will be able to negotiate with the creditor and the surety to address those issues. There is no reason to think that this cannot be done successfully, as the business rescue process is often a matter of negotiating a solution to conflicting interests in relation to a financially distressed business.

[35] *Tuning Fork* paras 36 to 45 and the authorities there referred to on the limited circumstances in which a statute may as a matter of necessary implication operate beyond its express terms.

[36] An interpretative problem similar to that in this case arose in the well-known case of *Moti and Co v Cassim's Trustee*.[36] Moti and Co bound itself as surety for the maker of a promissory note in favour of Cassim's Trustee. The maker of the note, a firm, then entered into a deed of assignment of its estate with its creditors in terms of the provisions of the Insolvency Act 32 of 1916. Cassim's Trustee voluntarily signed the deed of assignment and the assignment was accepted and registered. The trustee then sued Moti and Co as sureties for the debt. The issue was whether by agreeing to the assignment the trustee had discharged the maker's debt and thereby released Moti and Co from its obligations as surety.

[37] Under the deed of assignment all the maker's property was assigned to the assignee for its realisation and distribution among creditors. The registration of the assignment rendered the deed 'binding upon all creditors of the debtor (whether they have assented thereto or not)'. Section 126(2)(*b*) of the 1916 Act provided that the effect of registration was 'to relieve the debtor from every debt which was due, or the cause of which arose before the deed of assignment, but subject always to the deed of assignment.'[37] The case turned on the meaning of the words 'relieve the debtor from every debt'.[38] The majority[39] held that to relieve a debtor from every debt amounted to a discharge of the debt and hence of the surety.

[38] The minority[40] view was that the section in terms did no more than relieve the debtor of the debt, without extinguishing it. De Villiers JA said:

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[36] *Moti and Co v Cassim's Trustee* 1924 AD 720 (*Moti v Cassim*).
[37] Ibid at 735. The reference on this page to s 126(1) appears to be in error as elsewhere in all the judgments the reference is to s 126(2)(*b*). Also, the quotation uses the word 'any', but elsewhere it is 'every', which appears to be correct. The Dutch text was perhaps more emphatic. It read 'dat de schuldenaar bevrijd word van alle schulden'. See at 743.
[38] Ibid per Innes CJ at 736 and per De Villiers JA at 748.
[39] Innes CJ, Kotzé JA and Wessels JA.
[40] De Villiers JA and JER de Villiers AJA.

‘The only question is: What is the legal effect of a deed of assignment on the liability of a surety? In my opinion sec 126(2)(b) is conclusive on the matter. It does not purport to extinguish the obligation but in terms merely relieves the debtor from the debts specified. That is as far as it goes, and beyond that it should not be extended. Being a release in a statutory assignment it should be confined strictly to what it legitimately covers. For as Voet (42.3.15) in connection with the *rescriptum moratorium* points out it is not to be presumed that the Legislature wishes to deprive a person of any rights or be liberal at the expense of a third party (cf Voet 46.1.39).

[39] J E R de Villiers AJA expressed the same principle in even pithier terms:[41]

‘It would, as it seems to me, be a denial of the elementary principle of justice to deprive a non-consenting creditor of his recourse against the surety on the assignment of the principal debtor’s estate. He may have relied, indeed he does usually rely, mainly or entirely on the surety’s resources when he accepted the principal debtor as such, and he takes the surety with the object of being able to fall back on him in the event of the principal debtor’s estate being insufficient to pay the debt. It follows that it would be merely a capricious forfeiture of the creditor’s rights to release the surety against the will of the creditor in the very event against which the … suretyship was interposed ie in the event of the debtor being unable to pay his debt and being compelled to surrender his estate or enter into some other arrangement with his creditors, whether under the *aegis* of the insolvency or otherwise.’

[40] We quote this latter passage because it highlights an important issue of context in relation to the interpretation of s 154(2). The purpose of obtaining security in the form of a suretyship is to have someone other than the debtor to look to for payment of the debt and this is only necessary when the debtor is in default or unable to pay. In *Jans v Nedcor Bank*[42] Scott JA gave a realistic exposition of the modern surety in saying:

'Sureties do not assume the obligations of others against their wills, but with their free consent. …. The example given by Baker J postulates a surety whose interest in the debt is no greater than that of a friend of the principal debtor. But today that is an infrequent occurrence. The

[41] Ibid at 750.

[42] *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA) para 30.

typical surety in modern society is one who binds him- or herself as co-principal debtor and guarantees the debts of a company or close corporation which has little in the way of share capital or assets but is dependent on credit in order to conduct its business. More often than not the business is that of the surety or a spouse who for various reasons chooses to conduct it through the medium of a company or close corporation with limited liability. A creditor will ordinarily refuse to afford credit to such a legal *persona* in the absence of a personal suretyship and few businesses can operate successfully without credit. The very existence of the debt is therefore dependent upon the existence of the suretyship while the object and function of the latter is, of course, to ensure proper payment of the former.'

The argument for Mr van Zyl is that s 154(2) does away with this protection, without any express reference to the position of sureties, after the adoption and implementation of a business rescue plan. A statutory provision should not lightly be construed as having that effect.

[41] We do not think it necessary to spend time on the debate between the majority and the minority in *Moti v Cassim*, for the simple reason that the language and context of s 126(2)(*b*) of the 1916 Insolvency Act was markedly different from the language and context of s 154(2). There is a passage in Innes CJ's judgment where he recognised the difference between relieving the debtor of the debt and relieving them from liability to be sued on the debt. It reads:[43]

'Turning now to sec. 126(2)(b) … the question really hinges upon the meaning of the expression, "to relieve the debtor from every debt." The words are wide and unconditional --- they apply to every existing debt in its entirety. There is no limit as to amount or as to time. Relief no doubt includes temporary or partial removal; anything which relieves. But the derivation of the word (relevare) and its ordinary use makes it applicable to an absolute removal also. And the provision here is that every existing debt is to be lifted --- permanently lifted --- from the debtor. *He is to be relieved from the debt itself, not merely from liability to be sued upon it*. And that involves the termination of the obligation --- an idea which is in consonance with the scheme as a whole.' … "Relieve" is a wider word than "discharge"; but every discharge of an obligation is a relief to the debtor, and may be properly so described.' (Emphasis added).

[43] Ibid at 736-737.

[42] Both Innes CJ and Wessels JA referred in their judgments to the fact that the sections dealing with the discharge of the debtor's debts on rehabilitation and composition contained provisions that the liability of the surety was expressly preserved. However, only Wessels JA drew an inference from this and that was that the omission of a similar provision was a *casus omissus*. The Chief Justice was clearly of the view that there was no rational basis for treating suretyships differently in the case of assignment from suretyships in the case of rehabilitation or composition.

[43] Some play was made in argument of the fact that in s 155(9) dealing with arrangements and compromises with creditors express provision is made for the liability of the surety to be unaffected by the compromise. In our opinion, no inference can be drawn from this. Section 155(9) has much in common with the provisions of s 311 of the Companies Act 61 of 1973 which contained a similar provision. It is impossible to tell why no similar provision was inserted in, or as an adjunct to, s 154(2). Absent that, no inference relevant to the interpretation of s 154(2) can be drawn from the inclusion of s 155(9). In any event our interpretation of the section means that there would be no need for such a provision in cases falling under s 154(2).

[44] A final consideration is that we are enjoined by s 39(2) of the Constitution to interpret s 154(2) in the manner that best promotes the spirit, purport and objects of the Bill of Rights. It seems to us that the rights of a creditor under a deed of suretyship constitutes property within the meaning of that expression in s 25(1) of the Constitution.[44] If s 154(2) is construed in the manner for which Mr van Zyl contends the effect of the section will be to bring about a deprivation of

[44] *National Credit Regulator v Opperman and Others* [2012] ZASCA 29; 2013 (2) SA 1 (CC); *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZASCA 23; 2015 (6) SA 125 (CC) para 40.

property and to do so without any outward expression that this is its effect. The ordinary creditor, in possession of a deed of suretyship and confronted with a business rescue plan and s 154(2), would not read the section as providing that the deed of suretyship would be rendered worthless on adoption and implementation of the plan. This supports the conclusion that the section does no more than render the debt unenforceable to some extent against the debtor, but leaves the suretyship untouched.

Result

[45] The primary argument on behalf of Mr van Zyl that his liability as surety to Auto Commodities was discharged upon adoption and implementation of BCM's business rescue plan must fail. We hold that s154(2) does no more than preclude creditors from pursuing claims against the company after the business rescue plan has been 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.

[46] The appeal is dismissed with costs.

M J D WALLIS
JUDGE OF APPEAL

for O L ROGERS
ACTING JUDGE OF APPEAL

Appearances

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