IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 7311/13

In the matter between:

ABSA BANK LIMITED Applicant

versus

THEODOR GUSTAV DU TOIT First Respondent
THE WAVES AT WILDERNESS PROPERTIES (PROPRIETARY) LIMITED (Reg. No: 2004/013460/07)

GOLDCOAST MANAGEMENT CC Second Respondent
(Reg. No.: 1995/055209/23)

GOLDCOAST MARKETING CC Third Respondent
(Reg. No: 1992/001884/23)

JUDGMENT DELIVERED: FRIDAY, 13 DECEMBER 2013

SALDANHA J

[1.] This is an application for summary judgment against each of the defendants in their capacities as sureties and co-principal debtors for the indebtedness of The Waves at Wilderness Development (Pty) Ltd (the principal debtor, the company) for an aggregated amount of R27 184895.28 together with costs on a scale as between attorney and client. The indebtedness arose from an overdraft cheque account, mortgage loan agreement and a term loan

agreement.

[2.] The company had undertaken a development in Wilderness known as the Waves. A hotel and property development formed part of the enterprise. On the 27th April 2011 the company was placed in business rescue in terms of section 129 of the Companies Act 71 of 2008 (the Companies Act). On 7th December 2011 the Company & Intellectual Property Commission appointed Johannes Frederick Klopper as the business rescue practitioner. He prepared a proposed Business Rescue Plan in terms of section 50 of the Companies Act for the consideration of creditors. The plaintiff was the principal creditor and had a secured claim against the companies. Meetings with creditors were held in terms of the Act and an amended business rescue plan was adopted.

[3.] The defendants opposed the application for summary judgment primarily on two grounds, namely;

(i) that the plaintiff's claim against the company have or will be extinguished by reason of the amended business rescue plan. The defendants' contended that as their liabilities as sureties were accessory in nature and since the principal debt of the plaintiff has or will be extinguished against the Company by virtue of section 154 of the Companies Act, the sureties' liabilities would also be extinguished, and

(ii) That the deponent to the application for summary judgment Gregory Elias Mpho Thangoana (Thangoana) was not in a position to swear positively to the facts verifying the plaintiff's cause of action in accordance with Rule 32(2) of the

Uniform Rules of Court.

[4.] The first defendant claimed that based on an email from the office of the business rescue practitioner dated the 2nd April 2013 in which it is stated that the process of the business plan had at that stage not been finalized because they were attending to an adjustment account in terms of the sale of the business and that the plaintiff had received *".. a substantial initial payment from the Company."* The business rescue practitioner had further stated *"that the finalization of the adjustment account will no doubt affect the final payment to ABSA Bank."* Defendant submitted that there was no indication in the plaintiff's summons that reflected the extent to which the claim against the principal debtor had been reduced or extinguished and that the court in the exercise of its discretion in these proceedings should take such failure on the part of the plaintiff into consideration.

The relevant dates.

[5.] The summons in the matter was issued on the 13th May 2008 and served on the defendants on the 24th May 2013. The amounts claimed in the Particulars of Claim is based on Certificates of Balance in the amount of R18 227 762.65 in respect of the first claim, the amount of R5 824 654.60 in respect of the second amount the amount of R 3 132 478.03 in respect of the third. The Appearance To Defend was entered on 5th June 2013 and the application for summary judgment was issued and served on the 19th June 2013 together with the affidavit deposed to by Thangoana on the 11 June 2013.

The cause of action.

[6.] The cause of action is based on three suretyship agreements which were attached to the particulars of claim. The plaintiff alleged that *"a business rescue plan in terms of Chapter 6 of the Act was developed and implemented, which business rescue plan provided that implementation thereof shall not affect any rights that any creditor (including plaintiff) may have against any surety for and on behalf of the principal debtors."* The business rescue plan was not attached to the Particulars of Claim and neither was it attached to the defendants opposing affidavit deposed to by Mr. Theodor Gustav Du Toit the first defendant and sole member of the third and fourth defendants and the director of the second defendant.

[7.] During the course of the hearing of the application, counsel for the plaintiff tendered the amended business rescue plan into evidence and with the consent of the defendant was placed before the court.

[8.] In the opposing affidavit Du Toit referred to an email dated 2nd April 2013 from a Mr. Dawie van der Merwe (Van Der Merwe) of the Independent Corporate Recoveries Advisers addressed to the attorneys of one of the defendant's co-sureties in response to an enquiry regarding the progress of the implementation of the business rescue plan. In the email Van Der Merwe advised (i) that the final implementation of the business rescue plan which had been adopted at the meeting of creditors was to take place approximately two weeks following the email. (ii) that the representatives of the plaintiff had attended the various

meetings of the creditors and has voted in favour of the business rescue plan. (iii) that plaintiff was very much involved in the entire business rescue process. (iv) that plaintiff had received a substantial initial payment from the company. Du Toit further referred to an email dated 19 October 2012 from Van Der Merwe addressed to him with regard to the business rescue in which Van Der Merwe stated;

"Upon the transfer of the property to Steven, the BR Plan will have been fully implemented and all three companies will be released from BR. As director, the companies will therefore be returned to you. Having no assets or liabilities you may then elect to liquidate the companies or leave them to become dormant."

[9.] The plaintiff objected to the reference to the emails by the defendant as inadmissible hearsay. The defendants contended that given the business rescue practitioner effectively stepped into the shoes of the company as the director the court should have regard to the content of the emails and that their content were of strong probative value.

The amended business rescue plan.

[10.] Both the plaintiff and the defendant referred to the provisions of 6.4 and 6.5 of the Amended Business Rescue Plan which provided as follows;

"6.4 The amounts made available for payment to creditors of the combined businesses in terms of this BR Plan are paid in full and final settlement of any and all claims creditors may have against the combined businesses.

6.5 Such settlement is not intended to affect any rights that any creditor may

have against any third party who had bound itself as surety, or on any other basis in law, for and on behalf of either Views Restaurant or Views Development."

[11.] Mr. Woodland SC who appeared on behalf of the defendant submitted that paragraph 6.4 provided for the extinguishing of the debt owed by the company through the use of the words, *"in full and final settlement of any and all claims creditors may have against the combined business."* He submitted further that inasmuch as the liabilities of sureties were accessory in nature and notwithstanding that the defendants were co-principal debtors the defendant's liability under the suretyship was conditional upon the existence of the principal obligation. In the absence of a valid principal obligation the defendants as sureties could not be bound any further to the plaintiff. In this regard he relied on Caney's **The Law of Suretyship in South Africa 6th Edition CF Forsyth and JT Pretorius;**

"(a) The accessory nature of the surety's obligations

The fact that the surety's obligation is an accessory obligation is often invested with an air of mystery that apparently justifies without further explanation many aspects of suretyship. In fact the concept is relatively straightforward. It means simply that for there to be a valid suretyship there has to be a valid principal obligation, between the debtor and the creditor. The suretyship is said to be accessory to the transaction which creates the obligation of the principal debtor. Put another way, every suretyship is conditional upon the existence of a principal obligation.

From this flows the fundamental but obvious proposition that in the absence of a

valid principal obligation the surety is not bound, so exceptional cases aside, the surety can raise any defence which the principal debtor can raise."

See also Joubert et The Law of South Africa Vol 26 para 294;

"Liability of surety who has bound him- or herself also as co-principal debtor A surety who has bound him- or herself as surety and co-principal debtor remains a surety whose liability arises wholly from the contract or suretyship. The consequence of a surety also undertaking liability as a co-principal debtor is that he or she thereby renounces the benefit excussion and division and that vis-à-vis the creditor becomes liable jointly and severally with the principal debtor. He or she retains the benefit of cession of actions and, inasmuch as his or her debt remains accessory to the principal debt, he or she also has available to him or her those defences attaching to the principal debt which are normally available to sureties. Where there is more than one debtor in any given circumstances, liable on a single obligation on the basis that the creditor may claim payment of the whole debt from only one debtor, it flows naturally that the co-principal debtor may be held liable on the basis of the contract of suretyship."

[12.] Mr Woodland submitted that insofar as paragraph 6.5 of the amended business plan sought to retain the plaintiff's right of recourse against the surety/defendants it could not do so as the defendants was not a party (at least there was no evidence that they were a party) to the business rescue plan. Moreover he referred to the provisions of section 154 (1) and (2) which provided as follows:

"Section 154(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."

Section 154(2) of the Companies Act

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."

[13.] Mr. Woodland submitted that insofar as the plaintiff lost its right to enforce the principal debt against the company in accordance with section 154 (1) of the act it was precluded from enforcing the principal debt against the sureties. In accordance with section 154(2) the company had not only obtained by virtue of the business plan *"(a) full and final settlement of its indebtedness to the plaintiff"* but that Van Der Merwe had also stated that the company would have no liabilities as a result of the business plan and that the principal debt owed by the company to the plaintiff would have effectively become extinguished. Moreover inasmuch as the section 154(2) provides *"except for the extent provided for in the business rescue plan"* it was apparent that no provision contrary to the clauses 6.4 (referred to above) was made with regard to the continued enforcement of any principal debt which existed prior to the business rescue plan having been approved and implemented. Mr Woodland pointed out this provision related exclusively to the claim of the creditor against the company (in this case the

principal debtor).

[14.] Mr Olivier S.C. in response who appeared on behalf of the plaintiff in response referred to the proviso's in the Deeds of Suretyship and in particular clause 9 which stated inter alia that;

"9.1 If the estate of the Debtor or any other person who has bound himself for the Debtor is sequestrated, liquidated, surrendered or placed under judicial management, administration, compromise or arrangement, either by way of statute or otherwise:

9.1.1 the Bank may, in its discretion, decide to institute a claim against such estate and to calculate the extent of such claim, without affecting or diminishing my/our liability in terms hereof;

9.1.2. the Bank shall be entitled to apply all proceeds or payments which are received from the Debtor, curator, liquidator or from any other source in diminishing the amount owed, without affecting or diminishing my/our liability in terms hereof for payment of the amount which is owing to the Bank by the Debtor after receipt of such proceeds or payments.

9.1.3 If any payment which has the effect of diminishing or discharging my/our obligations in terms hereof is set aside by law or due to any other reason, or is repaid as a result of agreement by the Bank, U/we(sic) shall be liable to the Bank for any and all amounts owing by the Debtor as a result of the said setting aside or repayment, notwithstanding that such setting aside or repayment has taken

place after my/our obligations in terms hereof have been terminated in all respects…"

[15.] Further clause 7 of the Deeds of Suretyship specifically stated inter alia:

"7.3 enter into any arrangement, compromise or settlement or grant an extension to the Debtor or any surety;"

[16.] In reference to these clauses and in particular clause 6.5 of the business rescue plan Mr Olivier submitted that the adoption and implementation of the plan did not prejudice the plaintiff's claim against the sureties and that the claims were not extinguished as contended for by defendants. Mr. Woodland however pointed out that the defendant's reliance on clauses 9 and 7.3 of the Deeds of suretyship was misplaced insofar as the provisions of the business rescue plan brought about the extinguishing of the principal debt as opposed to that provided for under the provisions of clause 9.1 of the Deeds of Suretyship. Mr. Olivier pointed to the Business Rescue Plan in the clauses 6.4 and 6.5 of the Business Rescue Plan as evidence of an intention of the parties to retain the continuing liability of the sureties and conceded that on the face of it that the provisions under 6.4 and 6.5 could be relied upon differently by either the plaintiff or the defendant.

[17.] Mr Olivier also referred to the unreported decision of Kathree-Setiloane J in **African Bank Incorporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & Others under case number 20947/12 delivered on**

29 August 2013. That matter dealt primarily with the determination of the interpretation of a term *"binding off"* in section 153(1)(b)(ii) of the Act and a related constitutional challenge and moreover the provisions of section 133. The plaintiff referred to paragraph 67 of the judgment in which the court refers to sureties, as follows:

"[67.] The Bank maintains that the fact that the company was placed under business rescue cannot deprive it of its right to pursue the sureties under the suretyships. Jordaan and the Nchite's, no doubt, have expressed the contrary view. At the Second Meeting of creditors, the Nchites' attorneys indicated that the binding offer made by his client was in full and final settlement of the Banks claim. Jordaan confirmed this at the meeting. In his answering affidavit, Baldwin Nchite states that the Bank's claim 'in terms of the sureties stands to be decided upon the agreements themselves, as well as the status of the business rescue proceedings at the time such actions are instituted'. The Bank, accordingly, seeks a declaratory order to the effect that the adoption of a business rescue plan, in respect of a company placed under business rescue, will not affect the rights which a creditor has under suretyships executed in favour of the creditor, for the payment of amounts owed by the company placed under business rescue.

[68.] The is no express provision contained in chapter 6 of the Act which provides that the adoption of a business rescue plan will deprive creditors of the company in the business rescue, of their rights as against sureties for the debts of the company in business rescue. The effect of such provision, in my view, would be drastic as it would deprive a creditor of its rights as against a third party

(surety) simply by virtue of the adoption of a business rescue plan for the debtor. If the legislature intended that the adoption of a business rescue plan would have such a far reaching consequence, the legislature would have expressly provided for this consequence."

[18.] Mr Woodland pointed out that the decision did not deal with the provisions of section 154 and is therefore distinguishable to the present matter. That, in my view appears to be correct. Mr Woodland also pointed out that section 154 does not extinguish a third parties liability to a principal debtor as it could by separate agreement obtain a guarantee in the business rescue process for the continued liabilities of the principal debtor and by virtue of the section 154(1)and (2) where provision could be made in the business rescue plan that the principal debt not be extinguished and which by implication would mean the retention of the principal creditors right of recourse against a surety.

[19.] In these proceedings I am required to determine whether the defendant has set out a *bona fide* defence to the plaintiffs claim. The defendant has claimed that a substantial amount has in fact been received by the plaintiff in the business rescue proceedings. The accounting by the business rescue practice has however not been placed before this court and it is not clear exactly what the amount in fact is that the plaintiff received. I am mindful of the drastic nature of these proceedings and the different interpretations that is sought on the provision of the business rescue agreement and that of the relevant provision of the Act. I am satisfied in the circumstances that the defendant has raised a bona fide

defence to plaintiff's claim.

[20.] In light of such findings it is not necessary to deal with the remaining issues raised by the defendant with regard to the authority of Thangoana to have deposed to the verifying affidavit on behalf of the plaintiff.

[21.] In the result the application for summary judgment is dismissed.

(1.) The defendant is granted leave to defend the matter

(2) Costs to be costs in the cause.