THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 18136/13

In the matter between:

TUNING FORK (PTY) LTD t/a BALANCED AUDIO	**PLAINTIFF**

And

JACOBUS MARTHINUS JONKER GREEFF	**FIRST DEFENDANT**
DELANO SHANON KASNER	**SECOND DEFENDANT**

Coram: ROGERS J

Heard: **19 MAY 2014**

Delivered: **28 MAY 2014**

JUDGMENT

ROGERS J:

Introduction

[1] The crisp but important issue in this case is whether a creditor loses its claim against a surety if a duly adopted and implemented business rescue plan provides for the creditor's claim against the principal debtor to be compromised in full and final settlement of such claim. A suretyship may stipulate that the claim against the surety will survive a compromise with the principal debtor but this is not such a case.

The facts

[2] The question arises here in an opposed application for summary judgment. The facts appearing from the answering affidavit are the following.

[3] The company which was later to become the subject of the business rescue plan began to purchase audio and visual equipment from the plaintiff during 2000. On 15 November 2011 the defendants, who are and have at all material times been the directors of the company, signed unlimited suretyships for the company's debts, present or future, in favour of the plaintiff. The terms of the suretyships were identical. The obligation undertaken by each surety was as surety and co-principal debtor and with the renunciation of the usual benefits, including excussion. The suretyship provided that a certificate under the hand of the creditor would be *prima facie* proof of the amount due and owing by the company.

[4] The suretyship was a continuing one which was not to be affected by any change in or temporary extinction of the company's obligations. Mr Subel SC, who argued the matter for the plaintiff, accepted that this did not change the accessory nature of the surety's obligation. If the principal debt was 'changed', the surety would, in terms of the provision I have summarised, be liable for the changed debt. If the company at any time discharged its existing liability to the plaintiff but subsequently incurred a new liability, the surety would be liable for the new liability despite the 'temporary extinction' of the principal debt.

[5] On 31 July 2013 the company was placed in business rescue pursuant to Chapter 6 of the Companies Act 71 of 2008 ('the Act'). The business rescue practitioners prepared a business rescue plan as envisaged by s 150. The plan was considered and adopted by a meeting of the relevant stakeholders on 4 October 2013.

[6] The purpose of the plan was to allow the company to continue trading. An amount of R6 million was to be paid on account to a particular supplier (an entity named as Group Appliance) which had been the company's largest trade creditor by far. This would allow the company to continue receiving stock. Group Appliance's claim was not to be compromised though it was evidently willing to await a revival of the company's fortunes before demanding payment of the balance of its claim. Two banks with secured claims were to receive a specified amount. The remaining concurrent creditors, including the plaintiff, were to receive a dividend of 28,2 cents in the rand in full and final settlement of their claims. The business rescue practitioners said that this was an improvement on the anticipated concurrent liquidation dividend of 18 cents in the rand.

[7] The relevant clause in the business rescue plan, insofar as the concurrent creditors are concerned, reads as follows (inclusive of its heading):

'**Section 150(2)(b)(ii) - Release from debt**

Should the Creditors approve the Business Rescue Plan, the payment under the Business Rescue Plan to them will be in full and final settlement of their claims against the Company with the exception of Group Appliances. Group Appliance will continue to supply stock to the Company once the Business Rescue Plan has been implemented and will secure further payments in respect of their pre-commencement date from the Company in the future.

The Business Rescue Plan provides for a payment of R6,000,000,00 to Group Appliance in an attempt to ensure that the balance of the pre-commencement date is kept at a manageable level for trading purposes going forward.'

[8] Clause 7.3 stated that the company would continue in existence and operate after the implementation of the plan 'with its affairs having been restructured as provided for' in the plan.

[9] Clause 8.1 specified, among the 'special conditions to be satisfied', the adoption of the plan 'as full and final settlement of the Creditors' claims against the Company with the exception of Group Appliances'.

[10] In the schedule of concurrent claims annexed to the plan the plaintiff's claim was recorded in an amount of R626 375,42.

[11] On 25 November 2013 the business rescue plan was implemented. The plaintiff on that day received its concurrent dividend of R176 637,87. The business rescue proceedings formally terminated on 5 December 2013 upon the filing of a notice of substantial implementation as contemplated in s 132(2)(c)(ii).

[12] Action in the present case was instituted on 1 November 2013, ie after the adoption of the business plan but before its implementation. The form of action was a simple summons. The summons did not make mention of the business rescue proceedings. A notice of intention to defend having been delivered, the plaintiff on 2 December 2013 served an application for summary judgment. On 24 January 2014 the defendants filed their opposing affidavit. They raised two grounds of opposition, namely [a] that the compromise with the principal debtor released them from liability; [b] that they had reason to question the quantification of the plaintiff's claim.

[13] The answering affidavit did not say whether the plaintiff voted for or against the adoption of the plan. I shall revert in a moment to whether the manner in which a creditor voted affects the position of that particular creditor. I invited counsel during argument to tell me, if they were willing to do so by agreement, how the plaintiff had voted. They were apparently unable to agree. I intend to proceed on the assumption that the plaintiff voted in favour of the scheme. I do so because if such an assumption (which is the most favourable to the defendants) would be decisive in their favour, I would be inclined, despite the absence of evidence one way or the other, to refuse summary judgment in the exercise of the discretion I have in terms of rule 32(5). I do not think it would be fair to enter summary judgment against the defendants where it might emerge that, because the plaintiff supported the business rescue plan, it lost its claim against the defendants. The defendants may not even

know (though this is somewhat unlikely, given their close association and apparent continuing involvement with the company) how the various creditors voted.

Overview of conclusions

[14] It may be of assistance if I were, at the outset, to state the conclusions at which I have arrived on the main issue:

[i] Applying the well-established-test for implying a term in a statute, one cannot imply a term, in the business rescue provisions of the Act, to the effect that creditors' rights against sureties are or are not unaffected by the adoption of a business rescue plan. The matter has simply not been addressed.

[ii] The general principles of our law of suretyship must thus be applied to determine what effect, if any, the provisions contained in any particular business rescue plan have on sureties.

[iii] One of the general principles is that, if the principal debt is discharged by a compromise with or release of the principal debtor, the surety is released unless the deed of suretyship provides otherwise (the deeds of suretyship in this case do not provide otherwise).

[iv] This general principle applies also to a compromise or release pursuant to a statute, regardless of whether the creditor himself supported the compromise or release (unless, of course, the statute provides otherwise, which is not so here, given the absence of any express or implied term on the matter).

[v] Accordingly, if a business rescue plan provides for the discharge of the principal debt by way of a release of the principal debtor, and the claim against the surety is not preserved by such stipulations in the plan as may be legally permissible, the surety is discharged.

[vi] The plan in the present case is reasonably to be construed as one by which the company, as principal debtor, has been discharged from its liability to the plaintiff. Since the position of sureties for the company was not addressed in the plan, the defendants have on this construction of the plan been discharged.

[vii] Summary judgment must thus be refused.

<u>The quantum defence</u>

[15] I can dispose of the defendants' quantum defence in a few words. They say that, although the business rescue plan lists the plaintiff's claim as R626 375,42, there were mistakes in the quantification of this claim. Following further communication between the business rescue practitioners and the plaintiff, the latter's claim was, they assert, reduced by agreement to R515 650. The defendants add that in their view further credits must be passed but that the credit notes and explanatory documents are in the plaintiff's possession. They provide no particulars of these further credits.

[16] The amount which the plaintiff claims, and which was certified in the annexure to the particulars of claim, is R515 650, which on the defendants' version is the amount settled upon between the plaintiff and the business rescue practitioners. In oral argument, Mr Subel said that, if I granted summary judgment, the dividend of R176 637,87 would need to be deducted. As to interest, he said that the plaintiff would be content to claim *mora* interest as from 26 November 2013, the date following the receipt by the plaintiff of the dividend. I agree with Mr Subel that this is a best-case scenario for the defendants. (I mentioned to counsel in argument that the dividend received by the plaintiff was exactly 28,2 cents in the rand on the original claim of R626 375,42. This suggests that the plaintiff in fact received the dividend on the larger claim, not the reduced claim. Counsel were unable to explain this. However, it would be to the benefit of the defendants that the plaintiff received a larger dividend than perhaps it should have done.)

[17] There remains the question whether the defendants have said enough to call into question the amount of R515 650. I do not think so. They are, and have at all material times been, the directors of the company. They must have been closely involved in the drawing up and finalising of the business rescue plan, because among other things the plan includes a settlement of the amount which they owed to the company on loan account and required them to pay a sum of R6,5 million to the company in settlement thereof. Their family trusts were and remain the shareholders of the company. They are not in the position of strangers to the company's affairs, where a court might exercise its discretion against granting summary judgment to

allow the surety to test the quantification of the claim by way of discovery and so forth (cf *Gruhn v M Pupewitz & Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 57H-59A). I cannot believe that the business rescue practitioners would have settled the amount of the plaintiff's claim without consulting with the defendants. In any event, the defendants have not said enough to show that the relevant records are not in the possession of the company or that they have requested the records from the plaintiff and not received them.

[18] For these reasons, I do not think that the quantum defence passes muster as a ground for resisting summary judgment. I may add that, regardless of whether the plaintiff's claim was correctly quantified at R515 390,72, that was the figure settled upon between the plaintiff and the company (the latter represented by the business rescue practitioners). The company could not, I think, thereafter have disputed the quantum of the claim. And if that is so, the defendants, who stood surety for the company' debts arising from whatsoever cause, might well be bound in respect of the sum acknowledged by the company.

The discharge defence - relevant statutory provisions

[19] I turn now to the main point, namely whether the adoption and implementation of the business rescue plan resulted in the defendants' discharge.

[20] The procedure of business rescue was introduced into our law as part of Chapter 6 of the new Companies Act, which came into force on 1 May 2011. The definitions in Part A of Chapter 6 (s 128) apply to the whole Chapter. Parts B to D (ss 129 to 154) deal with new process of business rescue. Part E (s 155) deals with a separate procedure of compromise with creditors ('the compromise procedure').

The compromise procedure

[21] It is convenient to deal first with the compromise procedure. Section 311 of the repealed Companies Act 61 of 1973 dealt with offers of compromise in ss 311 and 312. The new compromise procedure and the old offer of compromise bear a number of similarities. The old procedure referred, as does the new, to a

'compromise or arrangement' and could concern creditors or members or both. The scheme needed to be approved, as in the new process, by a majority in number representing at least 75% in value of the creditors or class present and voting. As with the new procedure, the scheme, if approved, had to be sanctioned by the court. A sanctioned scheme was, as in the new procedure, binding on all creditors or members as the case might be.

[22] There are some differences between the new compromise procedure and the old offer of compromise. In the new procedure, only the board of the company or its liquidator (if it is in liquidation) may propose an arrangement or compromise. It is not necessary to obtain a court order to convene the meeting of creditors. The details which the proposal must contain are set out more extensively in s 155(3) than in s 312 of the old Act. The new Act expressly states that the sanctioning of a scheme by the court depends on whether the court finds the scheme to be 'just and equitable', though this is not a change in substance since that is the test which our courts in any event used in relation to the old schemes of arrangement.

[23] Section 155(3)(b) provides that the 'Proposals' part of the document sent to creditors or members must 'include at least' certain specified matters, among which are

> 'the extent to which the company is to be released from the payment of its debts and the extent to which any debt is proposed to be converted to equity in the company, or another company'.

[24] Section 311(3) of the old Act contained the following provision:

> 'No such compromise or arrangement shall affect the liability of any person who is a surety for the company.'

[25] Section 155(9) of the new Act contains a provision to identical effect and in substantially the same form:

> 'An arrangement or a compromise contemplated in the section does not affect the liability of any person who is a surety of the company.'

Business rescue

[26] The new business rescue procedure was introduced in place of the unsuccessful procedure for judicial management in the old Act with a view to enhancing the prospects of reviving distressed companies to the general benefit of stakeholders and the economy.

[27] Once business rescue proceedings have commenced, the distressed company is protected from legal proceedings by way of the moratorium provided for in s 133 of the new Act. Both parties referred to the judgment I gave in *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC), where I held that the moratorium was a so-called defence *in personam* for the distressed company and did not protect a surety for the company. Counsel in the present case did not contend that *Investec* was wrongly decided. (I refused leave to appeal and I understand that a petition to the Supreme Court of Appeal was likewise unsuccessful.) In *Nedbank Ltd v Wedgewood Village Golf and Country Estate (Pty) Ltd & Others* Case 20896/2010 (an unreported judgment delivered on 3 July 2013), Blignault J was not persuaded that *Investec* was wrong (para 21), though he in any event found against the sureties on the basis of the express terms of the suretyships.

[28] I draw attention to the fact that there is no provision in the new Act which states that the moratorium does or does not operate in favour of a surety for the distressed company. The conclusion I reached in *Investec* was based on our common law of suretyship, having regard to the character of the statutory moratorium created by s 133 in favour of the company.

[29] Section 150 provides that the business rescue practitioner, after consulting the creditors, other affected persons and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of s 151. Save in minor respects, the matters that must be included in a business rescue plan, as specified in s 151(2), are the same as those that must, in terms of the new compromise procedure, be contained in a proposal for an arrangement or compromise in terms of s 155(3).

[30] The consideration and adoption or rejection of a business plan are dealt with in s 152. In the usual case, the voting interests will be held by creditors, though employees have a right to be heard (see s 144). The adoption of a business rescue plan requires support by the holders of more than 75% of the creditors' voting interests actually voted plus by the votes of at least 50% of the 'independent' creditors' interests actually voted (in terms of the definition in s 128(1), a creditor will be 'independent' if the creditor is 'not related to the company, a director or the business rescue practitioner'). If the plan alters the rights of any class of holders of the company's securities, a vote of such holders must also be taken; otherwise, the vote by the requisite majority of creditors constitutes final adoption of the plan (s 152(3)(b)).

[31] Section 152(4) provides that a plan that has been adopted is binding on the company, on each of the creditors of the company, and on every holder of the company's securities, whether or not such person was present at the meeting or voted in favour of the adoption of the plan or has proved a claim against the company.

[32] The company must, under the direction of the practitioner, take all necessary steps to implement an adopted plan (s 152(5)). Once the plan has been substantially implemented, the practitioner must file a notice of such implementation (s 152(8)). Section 132 (2)(c)(ii) provides that one of the circumstances which brings business rescue proceedings to an end is the filing of a notice of substantial implementation of an approved plan.

[33] Section 154 (the last of the sections dealing with business rescue) provides as follows:

'(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 the 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.'

Evaluation

The statutory moratorium

[34] In his written submissions, Mr Subel, after referring to the moratorium in s 133, quoted paragraphs 15 to 19 of my judgment in *Investec*. However, and as Mr Subel acknowledged in oral argument, the question that arises in the present case does not concern the statutory moratorium in favour of the distressed company but the effect of an adopted and implemented plan by which the creditor has received a concurrent dividend in full and final settlement of its claim against the principal debtor. The surety in *Investec* raised, as his first argument, that on a proper interpretation of s 133(2) there was an express protection in favour of the surety. I rejected that argument. The surety's other argument was that, on general principles of the law of suretyship, the moratorium in favour of the principal debtor operated also in favour of the surety. In rejecting that argument, I relied on the distinction between a defence *in rem*, which strikes at the existence of the principal debt, and a defence *in personam*, which provides a personal defence to the principal debtor while leaving the debt in existence. I found that the moratorium fell into the latter category and was thus not available to the surety.

[35] In the present case, by contrast, the statutory moratorium in favour of the company, which is by its nature temporary, has, with the finalisation of the business plan, been superseded by a release of the company against payment to the concurrent creditors of a specified dividend in full and final settlement of their claims. That is a distinction which potentially makes all the difference. Paragraphs 20 to 24 of *Investec* reflect that I was keenly aware of the distinction. There I made the assumption, without so deciding, that a duly adopted plan by which a creditor's claim was finally compromised would operate to discharge the surety. In *Investec* that stage had not been reached and might never have been reached (at the time the surety was sued, there was a contested application for business rescue pending before the court).

An implied term in the Act?

[36] Mr Subel's main submission in oral argument was that the lawmaker could not have intended, when enacting the provisions relating to business rescue, that a surety would be discharged merely because the principal debtor (the distressed company) had been released from the claim by virtue of a provision in a business rescue plan of the kind contemplated in s 150(2)(b)(ii). Mr Ferreira, by contrast, submitted that, in accordance with general principles of suretyship, a suretyship could not survive the discharge of the debt (whether through compromise or otherwise).

[37] A distinction must, in my view, be drawn between a legal consequence dictated by the terms of a statute and a legal consequence determined by the common law in response to a statutory event. If the statute deals with the matter, whether expressly or by necessary implication, *cadit quaestio*; the statute applies, regardless of what the common law might otherwise have determined. If the statute does not deal with the matter, the answer must be sought in the common law, even though such answer might be influenced by the character of the statutory event.

[38] In regard to a release from creditors' claims pursuant to the new compromise procedure, s 155(9) expressly provides that the compromise does not affect the liability of any person who is a surety of the company. That follows s 311(3) of the old Companies Act. If the new Act contained a similar provision in relation to a business rescue plan, the surety would remain liable and no question of the kind raised in this case could arise. The absence of a similar provision in relation to business rescue proceedings is striking. It seems to me to be exceedingly difficult to argue that the lawmaker intended there to be a similar safeguarding of rights in the case of business rescue proceedings but chose not to say so. The safeguarding provision in s 155(9) was enacted simultaneously with the business rescue provisions. Sections 150(2)(b)(ii) and 155(3)(b)(ii) are identical in framing the requirement that a business rescue plan and scheme of arrangement must deal with the extent to which the company is to be released from the payment of its debts. The safeguarding provision in s 155(9) must have been enacted (as was the old s 311(3)) because a scheme of arrangement with creditors would typically (though

not necessarily) contain such a release in settlement of the creditors' claims. A business rescue plan would also typically (though not necessarily) contain such a release, yet a safeguarding provision is absent. The obvious place for it to have been included, if it was intended, was in s 154.

[39] There are other instances where the lawmaker has expressly preserved claims against sureties despite a discharge of the principal debtor. Sections 119 and 120 of the Insolvency Act 24 of 1936 permit an insolvent to submit to his trustee a written offer of composition. Subject to certain conditions, an offer of composition becomes binding on all creditors if accepted by creditors whose votes amount to not less than three-fourths in value and three-fourths in number of the votes of all the creditors who have proved claims. Section 120(3) concludes with a provision that a composition shall not affect the liability of a surety for the insolvent.

[40] Another example relates to rehabilitation. The effect of rehabilitation is to discharge all debts of the insolvent which were due, and the cause of which had arisen, before the sequestration and which did not arise out of any fraud on the part of the insolvent (s 129(1)(b)). Section 129(3)(d) provides in that context that a rehabilitation shall not affect the liability of a surety for the insolvent.

[41] This statutory context, and particularly the presence of s 155(9), is a discouraging start for the argument that the business rescue provisions contain a necessarily implied term preserving rights against sureties where the principal debtor has been released pursuant to an approved and implemented business rescue plan. In *Rennie NO v Gordon & Another NNO* 1988 (1) SA 1 (A) Corbett JA (as he then was) said, with reference to a plethora of earlier cases, that our courts have consistently adopted the position that words cannot be read into a statute by implication 'unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands' (at 22E-H). This view has been repeated (see, for example, *American Natural Soda Ash Corporation & Another v Competition Commission & Others* 2005 (6) SA 158 (SCA) para 27). As I observed in *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC), slightly different formulations have at times been used by the Supreme Court of Appeal and the Constitutional Court, in particular modifications of language or implications that

are necessary 'to realise the ostensible legislative intention' or 'to make the statute workable' (para 29). I suggested the following synthesis (para 29):

'To say that effect cannot be given to a statute as it stands unless something is implied into it seems to me to be indistinguishable from saying that the Act is not workable without the implication. These two formulations (which mean substantially the same thing) are in turn the basis upon which one can to deduce that the implication is necessary to achieve the ostensible legislative intention.'

[42] I do not believe it can be said that an implication to the effect that rights against sureties are safeguarded is necessary to make the business rescue provisions of the new Act workable or that without such an implication effect could not be given to the Act as it stands. On the assumption that the reaction of the common law to a release of the kind contemplated in s 150(2)(b)(ii) is that sureties will automatically be released (a matter I shall address presently), the effect of the statute as it stands is perfectly workable. Upon the adoption and implementation of such a business rescue plan, the creditors would receive their dividend and the distressed company along with the sureties would be released. That might be less advantageous to creditors than the preservation of their claims against sureties but that cannot be equated with a conclusion that the business rescue provisions of the Act are unworkable.

[43] It must be borne in mind, in this regard, that the argument for the implication does not rest only, or even primarily, on a balancing of the interests of creditors on the one hand and sureties on the other. In the assessment of the argument for or against an implication, one must also take account of the interests of the distressed company and all its stakeholders, including employees and persons who have funded the company by way of share capital. Various possibilities would present themselves to the lawmaker if it were to deal with the matter expressly:

[i] The lawmaker might decide that the release of the company will not affect creditors' claims against sureties but that any surety sued by the creditor would still have his ordinary right of recourse against the company. The obvious commercial disadvantage of this choice is that the company might then face claims from sureties for the very claims which the company has compromised as against the creditors.

This would hinder the recovery of the company and the attainment of the objectives of business rescue. It would also discourage participation by those who might otherwise have been willing to provide ongoing support for the company after the termination of business rescue.

[ii] Alternatively, the lawmaker might decide that the release of the company will not affect creditors' claims against sureties but that sureties will lose their right of recourse against the company. This would be best for the creditors and the distressed company but unfair to the sureties. The surety's contingent right of recourse against the distressed company is incapable of being ascribed a value in the business rescue proceedings (for the same reasons as apply in the insolvency proceedings: see *Proksch v Die Meester & Andere* 1969 (4) SA 567 (A) at 589D-F; *Absa Bank Ltd v Scharrighuisen* 2000 (2) SA 998 (C) paras26-27) so that the surety would not be entitled to vote on the proposed adoption of the scheme (see the definition of 'voting interest' in s 128(1)(j) read with s 145(4)). Effectively, therefore, the sureties will be voiceless in the taking away of their rights of recourse. Although a surety undertakes his obligation in the expectation that the suretyship might be enforced for the very reason that the principal debtor is financially distressed, he might nevertheless take comfort from the existence of his right of recourse. Sometimes a creditor will claim from a surety rather than the principal debtor because the surety is an easier target. Or the creditor might sue the surety because the principal debtor is currently financially constrained though has reasonable prospects of recovery.

[iii] Alternatively, the lawmaker might decide that the release of the company will be accompanied by a release of claims against sureties. This would provide some disincentive for creditors to support a business rescue plan. Some creditors might have suretyships while others, who do not, might carry the day in the adoption of a business rescue plan. Nevertheless, as a general proposition the body of creditors determines whether or not to accept the plan. If a creditor is reluctant to support a business rescue plan because it would jeopardise his claim against a surety, he might be able to settle with the surety more favourably than with the company, leaving the surety to take over the claim and thus vote in regard to the business rescue plan (cf *Investec* para 22).

[iv] Another alternative is that the lawmaker might decide to leave it to the stakeholders to regulate the position of sureties by appropriate provisions in the business rescue plan. (Indeed, in the absence of an implied term in the new Act, that is the effect of the Act as it stands.) A surety is a contingent creditor of the company. I see no reason why a business rescue plan should not incorporate tripartite provisions operating between the creditor, the company and the surety. The plan might provide, by way of example, for the surety to pay an additional sum in settlement to the creditor and for the abandonment by the surety of his right of recourse against the company. Or the surety might agree that creditors' rights against him will be preserved (cf *Friedman v Bond Clothing Manufacturers (Pty) Ltd* 1965 (1) SA 673 (T) at 677D). Even if the surety were unwilling to make any compromise, there is authority for the view (see below) that the creditor and company could agree, as a term of the plan, that the creditor's right against the surety will be preserved, the effect being that the 'release' in favour of the company is merely be a *pactum de non petendo* and that the company acknowledges that it will be liable to the surety under the latter's right of recourse if the creditor chooses to sue the surety.

[v] In combination with the immediately preceding option, the lawmaker might also consider that a creditor, when taking a suretyship, can guard itself against the effects of a voluntary or statutory compromise or release by the inclusion of appropriate terms in the suretyship. Indeed, the standard suretyships used by banks and other large financial institutions in this country usually contain protection of this kind (cf *Cape Produce Co (Port Elizabeth) (Pty) Ltd v Dal Maso & Another NNO* 2002 (3) SA 752 (SCA) para 9; *Investec supra* para 25, *Nedbank Ltd v Wedgewood supra* para 5). (For this reason, the legal issue in the present case might not present itself for decision very often. I note, in passing, that the suretyships in this case were executed about six months after the new Companies Act came into force.)

[44] I express no view as to what the fairest choice would be if the lawmaker were to deal with the matter explicitly. The competing possibilities nevertheless show, to my mind, that there is no obvious answer permitting one to conclude that the lawmaker must have intended X or Y or Z, even though it did not say so. It has been held more than once that the court cannot fill a *casus omissus* in a statute and that it

is dangerous to speculate on what the lawmaker intended or would have thought appropriate (*Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter* 1987 (2) SA 583 (A) at 596J-597D; *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk and Other Cases* 1994 (3) SA 407 (A) at 422B-G).

[45] This does not lead to the converse conclusion that there is an implied term in the statute that sureties will be released. The position, in my view, is that the lawmaker has simply not dealt with the question one way or the other and that regard must thus be had to the common law when assessing the liability of the surety. As will appear, this is what happened in *Moti and Co v Cassim's Trustee* 1924 AD 720. Although *Moti* was not cited by counsel in written or oral argument, it seems to me the most relevant authority by far to the outcome of this case.

<u>The common law on discharge of sureties</u>

[46] Because the obligation of a surety is accessory, the general legal position is that extinction of the principal obligation extinguishes the obligation of the surety (Forsyth & Pretorius *Caney's The Law of Suretyship* 6th Ed at 188). Apart from the obvious case of discharge following payment in full by the principal debtor, the rule finds application, for example, where the principal debt is discharged by settlement or is extinguished by prescription (see Voet *Commentary on the Pandects* (tr Gane) 46.1.36; 46.3.13; 46.4.4; Van Leeuwen *Roman Dutch Law* (tr Kotze) 4.4.7; Pothier *Obligations* (tr Evans 1853) para 377; Wessels *The Law of Contract* 2nd ed paras 3951-3952 and 4038-4039. Pothier, in the text cited, puts it thus:

'It results from the definition of a surety's engagement, as being accessary to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety; it being of the nature of an accessary obligation, that it cannot exist without its principal; therefore, whenever the principal is discharged, in whatever manner it may be, not only by actual payment or compensation, but also by a release, the surety is discharged likewise; for the essence of the obligation being that the surety is only obliged, on behalf of a principal debtor, he therefore is no longer obliged, when there is no longer any principal debtor for whom he is obliged.'

[47] This general principle is the source of the defences often described as defences *in rem.* As noted, they are to be distinguished from defences *in personam*, such as (for example) the moratorium in s 133(2) which I found in the *Investec* case to be personal to the distressed company and to have no effect on the existence of the debt.

[48] It is to be noted that the liquidation of a company or the sequestration of an individual does not terminate the debts of the company or the individual. The rights of creditors to institute legal proceedings against the company or the trustee are restricted by statute but the debts remain and the creditors may prove them in the liquidation or sequestration. The fact that they receive a dividend which is less than their full claims does not mean that the debts are discharged (cf *Nel NO v Body Corporate of the Seaways Building & Another* 1996 (1) SA 131 (A) at 138E-139G).

[49] The general principle, that the accessory debt of a surety is discharged when the principal debt is discharged, has been stated in numerous authorities, including: the full bench decision in *Colonial Government v Edenborough & Others* (1886) 4 SC 290 at 296 (in the context of an allegedly material alteration in the principal debt); *Trust Bank van Afrika Bpk v Ungerer* 1981 (2) SA (T) at 225 *in fine* (in the context of a settlement with the principal debtor); *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) 609 (A) at 622I-623I (in the context of prescription of the principal debt); *Leipsig v Bankorp Ltd* 1994 (2) SA 128 (A) at 132H-133A (again in the context of prescription); *Millman & Another NNO v Masterbond Participation Bond Trust Managers Pty Ltd (under Curatorship) & Others* 1997 (1) SA 113 (C) at 122C; *Cape Produce Co (Port Elizabeth) (Pty) Ltd v Dal Maso & Another NNO supra* paras 3-7 (in the context of a subordination agreement executed between the creditor and the principal debtor); *BOE Bank Ltd v Bassage* 2006 (5) SA 33 (SCA) para 9 (waiver by creditor of portion of the debt releases the surety to that extent but not if the arrangement is a mere *pactum de non petendo*).

[50] This is the principle which was acted upon, though apparently in reliance on English cases, by a full bench in *Wides v Butcher & Sons* (1905) 26 NLR 578. I mention it because of its relevance to a settlement between an insolvent debtor and his creditors. The principal debtor in that case assigned her estate for the benefit of

her creditors in terms of s 158 of the Natal Insolvency Act of 1887. The deed of assignment stated that the signing creditors released, acquitted and discharged the debtor from all claims and demands whatsoever. In appending its signature, the plaintiff firm (the respondents in the appeal) added the subscript, 'subject to recourse upon third parties'. Thereafter the firm sued the defendant firm (the appellants in the appeal) as surety. Beaumont J and Dove Wilson J delivered substantive judgments and Broome J a brief concurring judgment.

[51] Beaumont J said that the question was whether the assignment was an absolute release of the principal debtor or only a covenant not to sue. He considered that, if the reservation made by the plaintiff had been contained in the body of the deed of assignment, it would have constituted a recognition by the principal debtor that the plaintiff might yet sue the sureties. Although Beaumont J did not expressly say so, his underlying premise was obviously that, if the creditor was reserving its right to sue the sureties, the principal debtor might be sued by the sureties in terms of their right of recourse. That was the risk which made it necessary for the creditor to prove that its rights against the sureties had been reserved with the consent of the principal debtor. (As Broome J said in his brief judgment, a reservation by the creditor of its rights against the principal debtor clearly modified the debtor's position and the debtor's assent to such a reservation was thus needed – p 589.) Beaumont J said that the plaintiff's insertion of the reservation beneath its signature had not been shown to be something to which the principal debtor had consented to and that the deed of assignment thus operated as an absolute release, with the effect that the sureties could not be sued.

[52] Dove Wilson J agreed, saying that there was nothing in the deed of assignment to show that the discharge was other than absolute. He stated the legal position thus (at 584):

'There is no doubt that a simple discharge of a debtor by a creditor discharges also the surety, upon the simple ground that if it were otherwise, it would be a fraud upon the debtor, to profess to discharge him of the debt due to the creditor, and at the same time to leave him open to recourse against him by the surety. But 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 the 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.'

[53] Dove Wilson J cited, as authority for this proposition, the test laid down by the House Of Lords in *Muir v Crawford* 1875 LR 2 HL at 456. It appears to me, with respect, that, based on our own authorities, the preferred reasoning is that the surety's release is a result of the accessory nature of his obligation. A unilateral intention on the part of the creditor to reserve his right against the surety is insufficient. If the creditor and the principal debtor reach agreement that the creditor will not sue the principal debtor but that the creditor preserves his right to sue the surety, with the resultant risk that the surety will be entitled to exercise his right of recourse against the principal debtor, the principal debtor's defence may be regarded as personal. The arrangement between the creditor and principal debtor does not prejudice the surety, because his right of recourse remains.

[54] I revert now to the decision in *Moti and Co v Cassim's Trustee supra.* Those who studied bills of exchange at university may recall the case for its discussion of the first point which had to be decided, namely the character of the obligation undertaken by a person who endorses a promissory note prior its delivery to the payee. I am not concerned with that question. It is enough to record that the Appellate Division unanimously found that the endorser (the appellant firm) was in the position of a surety for the maker of the note (the principal debtor) in favour of the respondent trustee (the payee/creditor). What is of importance, for present circumstances, is the decision of the court on the second question, namely whether, in the light of the release of the principal debtor pursuant to a statutory assignment of the debtor's estate under the Insolvency Act 32 of 1916, the appellant firm's liability as surety had been discharged. All five judges deliver judgments on the point, on which they divided three/two. I mean no disrespect to the two dissenting

judges (De Villiers JA and JER de Villiers AJA) when I say that a very strong majority decided the point in favour of the surety – Innes CJ, Kotzé JA and Wessels JA.

[55] All five judges proceeded on the basis that, if the effect of the statutory process had been to discharge the principal debt rather than giving the principal debtor a personal protection, the surety would be released, even though the statute did not say so. Innes CJ, consistently with other authority I have already mentioned, said that, when the principal debtor is discharged by a release, the surety is likewise discharged (at 737). The question examined in *Moti* was whether the principal debtor had been discharged.

[56] Because the statutory context bears close resemblance to the present matter and was regarded by the judges as important to the outcome, it is appropriate briefly to summarise it (as did Innes CJ at 733-735). Prior to the enactment of the Insolvency Act 32 of 1916, there were statutes in the former colonies and republics regulating insolvency. These statutes contained varying provisions for a composition between a debtor and his creditors and for rehabilitation. They were characterised by the express statutory reservation of creditors' rights against sureties, notwithstanding the release of the principal debtor upon a composition or the discharge of his debts upon rehabilitation.

[57] The Insolvency Act of 1916 'carefully followed' (see Innes CJ at 734 *in fine*) the old legislation in relation to offers of composition (ss 105-106) and rehabilitation (ss 108-112); and s 106(3) and 112(1)(d) repeated the preservation of rights against sureties insofar as these procedures respectively were concerned. (The procedures in question are substantially those subsequently enacted in ss 119-120 and 124-129 of the current Insolvency Act 24 of 1936.) The provisions regarding composition did not in terms state that the debtor was released or that his debts were discharged but such an outcome was and is inherent in the notion of composition. The provisions in question simply stated that a duly adopted composition would be binding on the debtor and all concurrent creditors but that an acceptance of the offer of composition would not affect the liability of any person who is a surety for the insolvent. The provisions regarding rehabilitation expressly stated that the effect of an order of

rehabilitation would be to discharge all debts of the insolvent but would not affect the liability of any surety for the insolvent.

[58] In addition to these two (by then) familiar processes, the 1916 Act introduced a third procedure, namely an assignment by a debtor for the benefit of his creditors (ss 115-128). It is unnecessary to describe the procedure governing such an assignment, save to note that it was an assignment which could become binding on all creditors by virtue of its acceptance by creditors representing at least three-fourths in value and in number (s 123). Section 126(1) stipulated that from and after registration of the deed of assignment it would be binding upon all creditors (whether they assented thereto or not) whose claims were due or the cause of whose claims arose before the date of the assignment. Paragraphs (b) of s 126(2) provided that the immediate effect of the registration of the deed of assignment was:

'(b) to relieve the debtor from every debt which was due or the cause of which arose before the date of the assignment, but always subject to the deed of assignment'.

[59] Innes CJ remarked upon, and clearly regarded as significant, the express preservation of rights against sureties in the composition and rehabilitation provisions and the absence of such express preservation in regard to the new assignment procedure. He considered that there was no material difference between the discharge of debts, as provided for expressly in the rehabilitation provisions, and the relief of the debtor from his debts, as provided for expressly in the new assignment provisions. Relief from debt, as used in the new assignment procedure, was used in the sense which for practical purposes was identical to a discharge of debts. The relief of a debtor from his debts was inconsistent with the continued existence of the debts (737). And his further conclusion was that, because the effect of the duly adopted assignment was to relieve the debtor of the debt in question, any surety for those debts was likewise on common law principles discharged (737 *in fine*).

[60] Innes CJ said that this conclusion was unaffected by whether the creditor who held the suretyship was or was not among the creditors who supported the assignment (at 736):

'There is some authority for the proposition that a dissenting creditor to a non-statutory composition is in a stronger position than one in the majority (*Voet* 2.14.28). But I agree with the members of the Provincial Division that the Statute intended to place all creditors on the same footing. So soon as the requisite proportion have signed, and registration has followed, the assignment is binding upon them all. I can find no differentiation between signatories and non-signatories. The results of registration affect all of them alike. And they follow from the express provisions of the Statute, not from the contract evidenced by the signatures to the deed, – though those signatures were necessary in order to set the statutory machinery in motion.'

[61] Innes CJ thought his conclusion to be inevitable if the court confined itself, as it was required to do, to the interpretation of the language of the Insolvency Act. He arrived at his conclusion with reluctance because he could see no reason why a surety should remain liable after a composition or a rehabilitation but not after an assignment. But a court of law, he said, had no power to improve a statute by reading into it something which is not covered by the words used (739). He thought that the lawmaker may have intended that the continuing liability of a surety should be dealt with in the deed of assignment, and he drew attention in that regard to the concluding words of s 126(2)(b) which I have already quoted: 'but subject always to the deed of assignment'. He found it unnecessary to decide what effect a stipulation in a deed would have which purported to preserve rights against sureties. He added, though, that in view of the practical importance of the matter it was desirable that any doubts should be removed by the lawmaker at an early date.

[62] Kotzé JA concurred, stating that relieving a debtor of debts necessarily meant that, *quoad* the debtor, there was no longer any debt or obligation. That being so, the natural effect of the removal of the principal obligation was that the sureties were also discharged (742). He held that there was no distinction between a voluntary act of release and a statutory release. Unless the statute, in discharging the principal debtor, reserved the right of the creditor against the sureties, the accessory obligation was likewise discharged (743). He also agreed with Innes CJ that a minority of creditors could be bound by a decision of the majority (743).

[63] Wessels JA likewise said that to relieve a person of a debt is to release him from the legal bond that binds him to his creditor; if a person is relieved or released from a debt, the debt is discharged *quoad* that person (745). The learned judge of appeal continued (745-746):

'Now if by the common law the debtor is discharged from a debt or from all his debts the surety is released. If in the case of assignment the creditors agree with the debtor that they will be satisfied with his assets and will take these in full settlement then they discharge the debtor from all obligation to pay them the difference between the amount of the debts and the value of the assets.

Of this discharge the surety is by our law entitled to take advantage.

Now the fact that the Legislature has altered the common law in the case of rehabilitation and composition and clearly enacted that the sureties are to remain liable, and the fact that in the case of assignment under Chapter 6 the Legislature has been silent as regards sureties, leads me to infer that the Legislature did not think of the case where sureties had bound themselves and an assignment under the Act takes place, and if the Legislature did not think of it, it could not have intended in such a case to alter the common law as regards sureties...

It appears to me, therefore, that we have to deal here with a *casus omissus* and that the Act has not deprived the surety of his common-law rights.'

[64] It appears to me that Innes CJ and Wessels JA proceeded on the basis that the lawmaker either did not think about the matter or, if it did, was content to leave it to the parties to deal with it in the deed of assignment. Either way, the common law would apply. Kotzé JA, after referring to the common law, said that the lawmaker 'must be taken to have intended the necessary effect of its language as contained in the sub-section, unless it appears that it did not intend that the surety should likewise be discharged', that it was for the creditor to establish that the lawmaker did not intend the law to take its ordinary course, and that there was nothing in the Act to show that the lawmaker had a different intention (742). Kotzé JA did not, as I understand this passage, mean to convey that there was a term necessarily implied in the statute that creditors would lose their rights against sureties. Rather, he was not persuaded that there was a positive intention to preserve rights against sureties, with the result that the common law, whatever it was, would apply.

[65] The two dissenting judges agreed with the majority that the matter was unaffected by whether a particular creditor had supported or opposed the assignment. They nevertheless reached a different conclusion by contrasting the terminology of the rehabilitation provisions ('discharging debts') and the new assignment provisions ('relieving the debtor'). They said that, in the rehabilitation provisions, the lawmaker had found it necessary to preserve rights against sureties because the stated effect of a rehabilitation order was to discharge the debts themselves. A preservation of rights against sureties was unnecessary in the case of the new assignment procedure, because s 126(2)(b) merely relieved the debtor from the debts without extinguishing the debts (De Villiers JA at 748; JER de Villiers AJA at 750-751). They were not prepared to assume that the lawmaker had been guilty of a *casus omissus.* Such a construction of the statute should not be entertained as long as the language of the Act was open to another construction. The reason they held another construction to be open was the difference in language I have just mentioned. In the process of interpretation, they also laid emphasis on the distinction between a voluntary release and a statutory one. De Villiers JA declined to express any opinion as to whether, in the case of a statutory assignment, a surety who was sued by a creditor could exercise his rights of recourse against the debtor (749). JER de Villiers AJA did not mention that point.

[66] It may be observed that De Villiers JA, in his judgment, contrasted the rehabilitation provisions with the new assignment provisions but did not advert to the existence of an express preservation of rights in the case of a statutory composition or explain the justification for its presence. JER de Villiers AJA referred to both the rehabilitation provisions and the composition procedure. In regard to the latter, he said that the mere acceptance of the composition does not discharge debts,

'but the Act provides (no doubt in order to exclude the operation of the common law as to arrangements between creditor and principal debtor) that the acceptance of the offer of composition by the creditors shall not affect the liability of any surety for the insolvent.'

The learned Judge of Appeal perhaps took it for granted that a composition would involve a discharge of the balance of the principal debtor's debts so that preservation of rights against sureties was necessary.

[67] The decision reached by the majority in *Moti* necessarily overruled the contrary expression of opinion in *Standard Bank of SA Ltd v Lewis* 1922 TPD 285 (at 290-291 per Mason J and at 295 per Gregorowski J) and in *Malmesbury Board of Executors and Trust Co v Duckitt and Bam* 1924 CPD 101 (at 105-109 per Searle JP). Both cases were was cited in argument in *Moti* (see 723) but neither the majority nor the majority judges found it necessary to mention them. In *Malmesbury Board* Searle JP thought that the cause of the surety's right of recourse against the principal debtor would arise only after the date of registration of the assignment and he thus considered that the creditor retained his right against the surety and that the latter retained his right of recourse against the principal debtor. A similar view was apparently adopted by the court a quo in *Moti.* None of the judges in the appeal approved that view. Innes CJ rejected it as follows (at 738):

'The Provincial Division was largely influenced by the view that the claim of the surety against the principal debtor did not arise before but after the assignment. It was not a debt "which was due, or the cause of which arose before the date of assignment," and was not therefore covered by sec. 126(2)(b). This is a point not necessary to decide. Because even if it were so – that is to say if the surety did not become a creditor unless and until he paid – the resulting position would, on my reading of sec. 126, be unaffected. The surety is released owing to the release of the principal debtor because his obligation is subsidiary to the main obligation; not because it does not itself fall within the wording of sec. 126. And the surety being released, his claim against the principal debtor after assignment can never arise.'

[68] *Moti* has been cited on many occasions in support of the accessory principle and I am not aware of any subsequent dissent from it. It was directly applied, for example, in *Standard Bank v Lowry & Another* 1926 CPD 328, where Gardiner J also held that the attempt by a particular creditor to reserve its rights against sureties by qualifying its signature to the deed of assignment with the words 'without prejudice to any security held by the bank' was ineffective; and also in *Madka v Kalsheker* 1954 (4) SA 185 (SR), where it was said that *Moti* 'unquestionably' represented the law on the point and that the surety's defence would have been bound to succeed but for the fact that the creditor's rights against the surety had been preserved by an express stipulation in the deed of assignment (at 186C-E). (I may mention, as an historical footnote, that s 45 of the Insolvency Law Amendment

Act 29 of 1926 amended the 1916 Insolvency Act by inserting, into s 126(2)(b) of the main Act, a proviso preserving rights against sureties, and that the statutory assignment procedure was abandoned with the passing of the Insolvency Act 24 of 1936. Whether the effect of the 1926 proviso was that the surety retained his right of recourse against the principal debtor was not, as far as I have been able to ascertain, the subject of any reported decision.)

[69] There is at least one instance where the full rigour of the accessory principle seems not to have been applied. It has been held that a surety is not released if the principal debtor, being a corporation, is deregistered or dissolved. In *Barclays National Bank Ltd v Traub; Barclays National Bank Ltd v Kalk* 1981 (4) SA 292 (W) Myburgh J had to consider, among other points, whether sureties had been released by the deregistration of the principal debtor. He found that this was not the case (294D-295F). He based his decision on the fact that the deregistration occurred after *litis contestatio* and on the fact that a statutory procedure existed for the restoration of a company to the register with the express statutory nullification of all the effects of deregistration. On appeal (1983 (3) SA 619 (A)) Botha JA gave the defence short shrift (at 633H-634A):

‘In my opinion this defence is without merit. In support of it, counsel said: there cannot be a debt without a debtor. Whatever validity such a statement may have in other contexts, it certainly cannot be applied to the facts of this case. It is not the law that a surety is freed from liability to the creditor when the principal debtor ceases to exist. If the principal debtor is a natural person and he dies, his surety remains liable to his creditors; and a surety for a company remains liable to its creditor if it is liquidated and dissolved under s 419 of the Companies Act. In short, there is no foundation for the argument that [the company’s] deregistration released the appellants from liability to the Bank.’

[70] The general principles relating to the accessory nature of the surety’s liability were cited by the sureties’ counsel to the court in *Traub*, reference being made *inter alia* to *Colonial Government v Edenborough supra* and *Moti* (see the summary of argument at 622H-623A). The counter-argument for the bank was that the deregistration provisions of the old Companies Act provided for retrospective reinstatement and that an application for reinstatement could be made at the instance of a ‘creditor’, necessarily implying that the company’s debts still existed

(625 *in fine*). The Appellate Division did not suggest that *Moti* was wrongly decided or that the accessory principle was not the general rule. Whatever the precise basis for the court's decision (I note that *Traub* was not mentioned before me in argument), I do not think it detracts from the conclusion, so clearly laid down by the majority in *Moti*, that the accessory principle applies to a discharge of the principal debtor by way of release or compromise, whether voluntary or statutory.

[71] I should add that, although the old Companies Act does not appear to have made express provision for the preservation of rights against sureties upon the deregistration or dissolution of a company, such preservation may well be achieved by s 83(2) of the new Act which contains a wide provision to the effect that the removal of a company's name from the register does not affect the liability of any former director or shareholder of the company or any other person 'in respect of an act… that took place before the company was removed from the register'. The execution of a suretyship on behalf of a company prior to its deregistration might well be such an act.

<u>Application of principles to present case</u>

[72] In my opinion, one has here a similar situation to that which confronted the court in *Moti*. The lawmaker re-enacted, with some modifications, the offer of compromise provisions and repeated the preservation which formally existed in respect of rights against sureties. The lawmaker also introduced the new procedure of business rescue. The lawmaker failed expressly to deal with the position of sureties and there is no basis for implying a term into the Act preserving rights against sureties. The common law must thus be applied once the distressed company has been released from its liabilities pursuant to a duly adopted business rescue plan.

[73] As in *Moti*, I do not think there is any distinction between the position of creditors who voted for the plan and of those who voted against it. A creditor who votes in favour of the adoption of the business rescue plan conveys nothing more that he is willing to be subjected to the effects which the scheme in law will have,

whatever they may be. Those effects are the same for those who support and those who oppose the plan.

[74] Section 150(2) sets out what must be included in a business rescue plan. The proposals in the plan

'must include at least … the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company'.

A business rescue plan is not required, on my reading of s 150(2), to provide for the release of the company from the payment of its debts. The plan must simply spell out the extent of the proposed release. There are a range of possibilities. A business rescue plan might leave the debts of the company unaffected altogether, with or without an extension of time for payment (in which case the extent of the proposed release might be regarded as nil); or the plan might leave the capital of the debts unaltered but modify the provisions as to interest or release the company of part but not all of the capital or interest, and such release may or may not be accompanied by the payment of a dividend. The effect of varying provisions of this kind on the liability of sureties will depend on an application of the common law to the precise terms of the plan.

[75] It is possible that a plan could, as I have previously mentioned, deal with their position on a tripartite basis or by way of arrangement between the creditors and the company in the form of a *pactum de non petendo* (see *Natal Bank v Bansfield & Co* (1885) 6 NLR 178 at 181-182; *Wides v Butcher Bros supra;* Innes CJ in *Moti* at 739; see also Forsyth & Pretorius *op cit* at 195). I do not see why this should not form part of the extent of the release. But I do not think a plan can provide that, as between the creditors and the company, the company will be released but claims against sureties preserved unless it is on the basis that the sureties retain their rights of recourse against the company (in which case the release would more properly be expressed as a *pactum de non petendo*).

[76] The question whether the defendants in the present case have been discharged thus depends on the terms of the approved plan. Since the question

arises at the stage of summary judgment, I do not think I can grant summary judgment unless I am satisfied that the plan is not reasonably capable of an interpretation that the company's indebtedness to the plaintiff has been discharged. I am not so satisfied. Clause 7.2, under a heading referring to 'release from debt', states that concurrent creditors, including the plaintiff, will receive the specified dividend 'in full and final settlement of their claims against the Company.' This is repeated in clause 8.1. Although, on my reading of s 150(2), a business rescue plan does not have to provide for a 'release', the most natural reading of the plan in the present case is that the company has been absolutely released from its debts to the creditors in question. In *Moti* the majority judges saw no distinction between relieving a debtor of a debt and discharging the debt. If anything, the justification for equating a release of a debtor in full and final settlement of the claim with a discharge of the debt is stronger. The release cannot be described as purely personal.

[77] Section 154(1) provides that a plan may stipulate 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 the debt owing to that creditor will lose the right to enforce the relevant debt or part of it'. Section 154(2) provides that if a plan has been approved and implemented, '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'. The two sub-sections appear to me to some extent to overlap. Both of them, in turn, might be considered unnecessary in the light of s 152(4), which states that a duly adopted plan is binding on the company and on all of its creditors, whether or not the creditor was present at the meeting, voted for or against the plan or proved a claim. The use of the word 'acceded' in s 154(1) also strikes me as inapt, because the lawmaker could surely not have intended that the discharge contemplated in that sub-section would depend on whether or not the creditor had agreed to the term in question; that individual agreement is not necessary appears from s 152(4).

[78] Be that as it may, I consider that the plan in the present case, on a reasonable (and perhaps the most probable) interpretation, provides that the debts owing to the concurrent creditors (other than Group Appliance) will be discharged by

the payment of a dividend in full and final settlement, with the result (somewhat unnecessarily stated in s 154(1)) that those concurrent creditors have lost their right to enforce the debts in question. The right to enforce the debts would also be precluded by the overlapping (and again somewhat unnecessary) terms of s154(2). And to the extent that it is relevant (and I do not believe that it is), I must decide the case at this stage on the assumption that the plaintiff supported the adoption of the plan and thus (if s 154(1) were to be construed literally) 'acceded to' the discharge of the company's debt to it.

[79] The plan contains no provision preserving the creditors' rights against sureties and at this stage there is no basis for implying such a preservation. Mr Subel did not argue that the plan contained such a preservation nor did he contend that, if the defendants were liable, they retained their rights of recourse against the company. His argument was simply that the release of the company from its debts did not affect the sureties, and that is an argument which, for the reasons I have given, I cannot accept.

[80] I need not now decide whether evidence of background and surrounding circumstances would be admissible in the interpretation of the plan and, if so, whether there is any evidence which could conceivably lead to a different construction being placed on the plan. I do not know whether the position of sureties was discussed in meetings between the creditors and the business rescue practitioners. The plaintiff may unilaterally have assumed that its rights against the defendants would be unaffected by the adoption of the plan. It may even be that the business rescue practitioners thought that in law creditors who held suretyships would be able to enforce them without the sureties having any right of recourse against the company. The defendants may have held a different view. They owed the company R11 375 770 on loan account. In terms of the plan they agreed to pay R6,5 million to the company in full and final settlement of their liability. This was part of the funds which enabled the business rescue practitioners to make their proposals, including a material improvement on the liquidation dividend which creditors would otherwise receive. If the defendants had been told that they might yet be held liable to concurrent creditors as sureties, they might not have been willing to raise the sum of R6,5 million (the source of these funds, and whether the

defendants themselves had surplus assets to that extent, are at this stage unknown). The various apprehensions or misapprehensions as to the law which the parties may have entertained cannot in themselves affect the interpretation of the plan.

[81] It may be mentioned that there is not even the difference of language in the Act which might have justified the distinction on which the two dissenting judges in *Moti* based their decision. Here the language used, both in relation to business rescue plans and schemes of arrangement, is 'the extent to which the company is to be released from the payments of its debts', yet there is an express reservation in the latter instance but not the former.

[82] I was referred to the judgment of Kathree-Setiloane J in *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & Others* 2013 (6) SA 471 (GNP). The learned judge was called upon to decide a number of issues arising from business rescue proceedings. The effect of paras 19 to 64 of her judgment was that the business rescue plan in that case had, because of the invocation by a particular stakeholder of s 153(1)(b)(ii) procedure, been validly adopted and become binding. The plan provided among other things for the compromising of creditors' claims, including the claim of the plaintiff. The learned judge refused the relief sought by the applicant (a creditor) in regard to the setting aside of the plan. In paras 65 to 72, however, she concluded that the applicant was entitled to a declaratory order that the sureties for the company's indebtedness remained liable. Although the learned judge cited my judgment in *Investec* in support of her conclusion (para 70 and footnote 29), *Investec* is in my respectful opinion distinguishable for the reasons I have stated.

[83] It may be thought illogical that, after the commencement of business rescue proceedings but prior to the adoption of a business rescue plan, the company enjoys the protection of a personal moratorium which the surety cannot invoke, whereas after the adoption of a business rescue plan a creditor might be precluded from suing the surety. But there is in truth no illogicality. It all depends on what the business plan eventually stipulates. The commencement of bankruptcy proceedings may provide for a temporary moratorium personal to the debtor; but a compromise

or release might come later, and the effect of such compromise or release might differ from a personal moratorium.

[84] The judge in *African Banking of Botswana* said (para 68) that there was no express provision in Chapter 6 of the Act which provides that the adoption of a business rescue plan would deprive creditors of their rights against sureties. That is true but there is likewise no provision in the Act which preserves rights against sureties. Whether the adoption of a business rescue plan will or will not affect a creditor's right against a surety will, for the reasons I have explained, depend on an application of common law principles to the actual terms of the plan.

[85] The learned judge said that the effect of a statutory provision depriving creditors of their claims against sureties would be 'drastic', because it would deprive a creditor of its rights against the surety simply by virtue of the adoption of a business rescue plan. She considered that if the lawmaker had intended the adoption of a business rescue plan to have such a 'far-reaching consequence', the lawmaker would have expressly provided for this consequence (para 68). Of course, and as I have said, the adoption of a business rescue plan does not without more affect a creditor's rights against the surety; it depends upon an application of the general principles of the law of suretyship to the actual provisions of the plan. Accepting, though, that a business rescue plan will often provide for the principal debtor's release, the question whether the effect of discharging the surety is 'drastic' depends from whose perspective one looks at the question and how one balances the competing interests. The surety might regard it as drastic to preserve a creditor's claim against him without preserving his right of recourse against the company. One might say that at least the creditors hold their fate in their own hands whereas the surety has no say in the matter.

[86] I thus respectfully disagree with the learned judge's conclusion to the extent that she held that the release of a distressed company from its liabilities to creditors under an approved business rescue plan left the position of sureties unaffected.

[87] I was also referred to the decision of Gorven J in *DH Brothers Industries (Pty) Ltd v Gribitz NO & Others* 2014 (1) SA 103 (KZP). That was again a case where, by

virtue of the invoking of the s 153(1)(b)(ii) mechanism, a plan had purportedly become binding on creditors. The plan made provision for the cession of creditors' claims to a third party against payment of their likely liquidation dividend or R100 which ever was highest. The business rescue practitioner contended that the liquidation dividend payable to various creditors, including the applicant, as independently valued was less than R100 so that those creditors would lose their claims against payment of that sum. The applicant applied for relief which included the setting aside of the resolution placing the company under business rescue, the setting aside of the appointment of the practitioner, a declaration that the s 153(1)(b)(ii) offer was not one as contemplated by the Act, and the setting aside of the purported approval of the plan.

[88] The learned judge found for the applicant on the first point (the invalidity of the resolution placing the company under business rescue) but acceded to a request to deal with the other grounds in case he was wrong. In the course of a detailed consideration of the further grounds, the learned judge dealt with the validity of a plan which provided for the cession of claims to a third party (paras 64ff). He said the submission depended, to an extent, on whether the plan precluded the applicant and other creditors from proceeding against sureties (para 65). He observed that the business rescue provisions did not contain the same preservation of rights as s 155(9). He considered that the effect of the plan in the case before him was that, since the claims of creditors were to be ceded and because there was no provision retaining the right of the cessionary to enforce the deeds of suretyship, the creditors would (if the plan were valid) be precluded from suing the sureties. The applicant argued that, because all creditors were bound by an adopted plan (whether they voted for it or not), the lawmaker would have included a similar protection to s 155(9) had it envisaged that compulsory cessions of claims could form part of a plan (para 66). The learned judge apparently agreed with this contention, saying that it 'must follow as night follows day that a plan which deprives non-acceding creditors of the right to enforce a claim against a surety does not pass muster' and that a compulsory cession could not be part of the plan (para 67).

[89] I need not decide whether a business rescue plan may or may not provide for a compulsory cession of claims. The plan in the case before me does not depend on

any such cession. Instead there is a release of the company from its debts. The Act expressly envisages that a plan may include a release of the company from its debts, and for all the reasons I have explained the effect of such a release must be determined with reference to general principles of the law of suretyship.

[90] In *Moti*, Innes CJ's concluding observation was that it would be desirable for the lawmaker to amend the Insolvency Act so as to clarify the position. Needless to say, that would be equally desirable in relation to business rescue.

Conclusion

[91] The application for summary judgment must thus be refused.

[92] In regard to costs, it is often appropriate in summary judgment proceedings to direct costs to stand over for determination at the trial or to order them to be costs in the cause, because the defence often depends on facts which may prove to be incorrect. Here, however, the primary point is one of law and I have decided it against the plaintiff. The position is much the same as where an exception based on a point of law is dismissed. It is notionally possible, upon the dismissal of an exception, that the trial judge might decide the law point differently but an exception in such circumstances would generally be dismissed with costs.

[93] Very little time was spent on the quantum defence. No apportionment of costs is warranted by the unsuccessful assertion of that defence.

[94] I make the following order:

[a] The application for summary judgment is refused and the defendants granted leave to defend the main action.

[b] The plaintiff shall pay the defendants' costs of opposing the application for summary judgment.

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ROGERS J

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