IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 17827/2014

DATE: 17 SEPTEMBER 2015

In the matter between:

BUSINESS PARTNERS LIMITED Applicant

And

KONSTANTINOS TSAKIROGLOU & 2 OTHERS Respondents

J U D G M E N T

LE GRANGE, J:

This is an extended return date of a *rule nisi* issued by Riley AJ on 13 May 2015 calling upon the first respondent to show cause why the order placing his estate under provisional sequestration should not be made final. The factual matrix underpinning the provisional order briefly stated is as follows: the applicant carries on business as a registered credit provider and financier. The applicant applied for the provisional sequestration of the first respondent's estate by virtue of the fact that the first respondent is indebted to the applicant in the total amount of at least R13 855 666.16. These are liquidated claims.

According to the applicant the first respondent's estate is factually insolvent as he owns no immovable property and possessed certain movable property with a limited value. The indebtedness of the first respondent to the applicant arises from a deed of suretyship concluded by him on 15 June 2009 ("the suretyship"), on behalf of a close corporation called Target Shelf 284 CC ("Target Shelf") of which he is the sole member.

In terms of the suretyship, the first respondent bound himself as surety and co-principal debtor to the applicant for the debts of Target Shelf. The suretyship is unlimited. Target Shelf is indebted to the applicant in an amount of not less than R13 855 666.16. The first respondent on 27 November 2013 caused a resolution to be filed in terms of section 129 of the Companies Act 71 of 2008, whereby he resolved to begin business rescue proceedings and place Target Shelf under liquidation.

According to the applicant, the business rescue practitioners, who procured their appointment through Mr Van Rensburg, the attorney of the first respondent, (who also argued the matter in this Court), proposed a spurious rescue plan which was

nothing more than a disguised liquidation. The rescue plan simply provided for the sale of immovable property owned by Target Shelf and wherein the business rescue practitioners refused to deal with the liability relating to the surety of the first respondent. As a result, according to the applicant, it viewed the purported business rescue as an abuse of process.

The applicant then exercised its 100% voting interest at the first meeting of the creditors of Target Shelf in February 2014 and voted against the business rescue plan. The applicant was immediately informed by the business rescue practitioners that they would launch an application to Court to declare the vote to be inappropriate. At the second creditors' meeting the applicant again used its 100% voting interest to reject an amended business rescue plan as it did not deal with all the concerns it raised via its attorney and *inter alia* did not deal with the question of the liability of the first respondent as surety.

Moreover, the applicant viewed the amended business plan as fatally flawed because there was no verification by the business practitioners that the immovable properties would fetch more on sale during business rescue proceedings than on liquidation, as in any event a forced sale was envisaged after 120 days. Furthermore, the applicant expressed the view

that the first respondent through Target Shelf conducted its affairs unlawfully. According to the applicant the immovable properties owned by Target Shelf were erected illegally and cannot be sold. In addition, the first respondent over a long period of time has failed to submit, on behalf of Target Shelf, tax returns, nor does it appear the first respondent kept the required books of accounts and records for Target Shelf.

In terms of the deed of suretyship, any default on the part of the principal debtor entitles the applicant to sue the first respondent as he bound himself as surety and co-principal debtor. The first respondent has also specifically waived the benefit of excussion in the suretyship. The first respondent raised a number of defences to oppose the provisional order, namely; had the applicant not opposed the business rescue proceedings in respect of Target Shelf, the applicant would in all likelihood have been paid the amounts due to it; the applicant had acted in a matter which was prejudicial to him and this entitles the first respondent to be released from his obligation as a surety. Furthermore, the first respondent suggested he would derive funds from Target Shelf to have met his obligations. It was however not disputed by the first respondent that certain buildings erected by Target Shelf were not in accordance with the local building regulations.

The first respondent also conceded that as a result of cash

flow problems on the part of Target Shelf, it did not file all the tax returns of Target Shelf timeously. Riley AJ, dealt extensively with the defences raised by the first respondent and came to the conclusion at para [42] of the judgment that the first respondent is factually insolvent. At para [28] the following was also stated:

> *"In any event it appears that all that the business rescue practitioners are in fact proposing amounts to, what has in my view correctly been described as 'a liquidation under the guise of a business rescue plan.' Accordingly I am satisfied that the first respondent cannot rely on the alleged prejudicial conduct of BPL (the applicant)."*

The first respondent's estate was accordingly placed under provisional sequestration. The findings by Riley AJ, are not seriously challenged on the return day. The first respondent however resists the granting of a final order by launching a counter-application. The nub of first respondent's counter-application is that as a surety he is entitled to the benefit of the statutory moratorium afforded under section 133 of the Companies Act, 71 of 2008.

A similar point was made by counsel for the first respondent,

which was considered and rejected by Riley, AJ. In his judgment, Riley AJ, placed reliance on the dictum in Investec Bank Limited v Bruyns 2012 (5) SA 430 (WCC), where the court examined the position of a surety in circumstances where the principal debtor is placed in business rescue. The court in Investec supra held at para [17] that the question whether section 133(1) statutory moratorium can be raised as a defence by the defendant as surety, in favour of the principal debtor company depends on the well-known distinction between defences *in rem* and defences in *personam*. The court held that the statutory moratorium in favour of the company undergoing business rescue proceedings is a defence *in personam* and concluded that such statutory moratorium in favour of the company does not avail the surety.

This time around Mr Van Rensburg, the instructing attorney of the first respondent, has clothed the same point in a constitutional garb. The first respondent has also joined the Minister of Trade and Industry and originally wanted to join the Companies and Intellectual Property Commission. The joinder of the latter was abandoned. Counsel for the Minister, Mr de Villiers-Jansen, indicated that the relief sought by the first respondent is opposed, but, due to the short service of the papers on the Minister, an affidavit in this regard could not be filed timeously.

Mr de Villiers-Jansen however aligned himself with the submissions made by Mr G Woodland SC, who appeared for the applicant. The crux of Mr Woodland's argument is that the counter-application is contrived and spurious and only brought to delay the inevitable final winding-up of the first respondent's estate. Furthermore, the first respondent's allegation that were it not for the section 133 moratorium, the applicant would not have pursued the first respondent in his capacity as surety and co-principal debtor *in solidum* with Target Shelf, is simply incorrect.

According to Mr Woodland this contention overlooks the fact that the first respondent bound himself in favour of the applicant as surety and co-principal debtor *in solidum* with Target Shelf, in terms of the suretyship. Moreover, the first respondent expressly waived the defences of the excussion and division and the applicant had a right to proceed against the first respondent the moment that Target Shelf fell into arrears.

The relief sought in the counter-application is essentially an order that:

"1. That the provisions of section 133 of the

Companies Act 71 of 2008 ("the Act") be declared to be unconstitutional and in conflict with the provisions of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), insofar section 133 of the Act precludes legal proceedings against a company or close corporation during business rescue proceedings but does not preclude legal proceedings, alternatively insolvency proceedings against a guarantee or surety of the same company or close corporation during such business rescue proceedings;

...

3. Declaring the legal proceedings initiated by the applicant under above case number against the first respondent and for the sequestration of first respondent's estate pursuant to a suretyship agreement while Target Shelf 284 CC (registration number 2002/097530/23) is or was subject to business rescue proceedings in terms of the Act to be unconstitutional and in conflict with the provisions of the Constitution of the Republic of South Africa, 1996;"

For purposes of the counter-application, the first respondent

alleges that his fundamental rights to equality, dignity and property as protected in the Constitution are infringed by section 133 of the Act as currently interpreted and applied. The nub of Mr Van Rensburg's argument, if understood correctly, is that section 133 of the Act, precludes creditors from instituting legal proceedings against a company or close corporation during business rescue proceedings, but permitting such creditors to bring legal proceedings, alternatively insolvency proceedings, against a guarantee or surety of the same company or close corporation during such business rescue proceedings. According to him it differentiates between people or categories of people, and such differentiation bears no rational connection to a legitimate government purpose. Mr van Rensburg for his proposition relies on the dictum in Harksen v Lane N.O and Others 1998 (1) SA 300 (CC).

It was also contended by first respondent and amplified in argument by Mr Van Rensburg that the court in Investec case supra if consideration was given to the relevant constitutional argument, would have arrived at a different conclusion, which would have benefited the first respondent.

I have carefully considered the arguments advanced by Mr Van Rensburg but remain unconvinced by it. Where section 9 of the Constitution is invoked it is to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that

amounts to unequal treatment or unfair discrimination. The first enquiry must be directed to the question as to whether the impunged provision does differentiate between people or categories of people. If it does differentiate, then in order not to fall foul of the provisions in section 9 of the Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve.

If it is justified in that way, then it does not amount to a breach of the provisions in section 9 of the Constitution. The assessment of this relevant question cannot be taken in a vacuum but must be based both on the wording of the section and the constitutional and historical context of the developments in South Africa. In Prinsloo v Van Der Linde and Another 1997 (3) SA 1012 (CC) at para [25] the following was stated:

> *"In regard to mere differentiation the Constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose for that will be inconsistent with the rule of law and the fundamental premises of the Constitutional*

State. The purpose of this aspect of equality is therefore to ensure that the State is bound to function in a rational manner."

In the present instance there is indeed differentiation albeit between natural persons and juristic persons in a sense that the moratorium in section 133 of the Act is available only to companies and close corporations and not to natural persons. However, as correctly submitted by Mr Woodland, the differentiation bears a rational connection to a legitimate government purpose. In Cloete Murray and Another NNO v Firstrand Bank Limited t/a Wesbank 2015 (3) SA 438 (SCA) the Supreme Court of Appeal held at para [14] that:

"It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable a company to restructure its affairs. This allows the practitioner in conjunction with the creditors and other affected parties to formulate a business rescue plan designed to achieve the purpose of the process."

The main purpose of the moratorium is thus designed to allow

business practitioners, in conjunction with the creditors and other affected parties, to formulate a business rescue plan to achieve the purpose of the process in restructuring the affairs of the company or close corporation. The differentiation between natural persons and juristic persons in section 133 of the Act clearly serves a legitimate government purpose. The criteria applied by the legislature to achieve this differentiation are not arbitrary but serves a particular purpose. There can in any event be no suggestion that the expressed purpose of section 133 of the Act as set out above would find any application insofar as natural persons are concerned, as the view expressed in Investec that the statutory moratorium in favour of the company undergoing business rescue proceedings is a defence *in personam* and as such the statutory moratorium in favour of the company does not avail the surety, was met with approval in Newport Finance Company (Pty) Ltd v Nedbank Limited; Mostert and Another v Nedbank Ltd 2015 (2) ALL SALR 1 (SCA) at para [13].

In any event in terms of the suretyship, the first respondent bound himself in favour of the applicant as surety and a co-principal debtor *in solidum* with Target Shelf. The applicant was therefore entitled to proceed against the first respondent the moment that Target Shelf fell into arrears in respect of its payment obligations to the applicant.

The first respondent's liability in this respect has nothing to do with the moratorium imposed by section 133 of the Act. Furthermore, the following remarks made in Investec supra at para [22] and [23] are apposite in this instance.

> *"[22] ... Whenever a creditor sues a surety, there is a possibility that at some stage in the future that creditor may compromise with the principal debtor or for that matter that the principal debtor may even discharge the debt by payment. These possibilities whether likely or unlikely do not permit the surety to ward off enforcement if at the time he is sued the principal debt is in existence. If the creditor takes judgment against a surety and the principal debt is later reduced or discharged before execution is levied against a surety, the latter could claim the benefit of the discharge or reduction. If the creditor were to recover from the surety in full, the right to consider a compromise against the principal debtor would pass to the surety because the creditor would fall out of the picture and the surety would take the creditor's place by a virtue of his right of recourse against the principal*

debtor"

"[23] ... If the lawmaker had intended to prohibit creditors from enforcing their claims against sureties of companies undergoing business rescue proceedings, it would have said so. Such a prohibition would be a drastic interference with the rights of creditors and would require a clear language. Here there is no language at all on which to rest this opposed prohibition."

For these reasons the Constitutional challenge of section 133 of the Act must fail. It follows that the counter-application cannot succeed. On a conspectus of all the papers filed of record, I am satisfied that the applicant is entitled to a final winding up order of the first respondent's estate. In the result the following order is made:

THE COUNTER APPLICATION IS DISMISSED WITH COSTS.

THE *RULE NISI* IS CONFIRMED AND THE FINAL ORDER IS GRANTED.

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LE GRANGE, J