THE REPUBLIC OF SOUTH AFRICA

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

Case No: 12189/2014

In the matter between:

ABSA BANK LIMITED **Applicant**

And

RUTH SUSAN HAREMZA **Respondent**

Coram: **BOZALEK J**
Heard: **10 MARCH 2015 & 15 APRIL 2015**
Delivered: **27 MAY 2015**

JUDGMENT

BOZALEK J:

[1] This is an application for summary judgment in which, once again, the principal issue is the liability of a surety for the debts of a company which has been the subject of business rescue proceedings.

THE FACTS

[2] Defendant bound herself as surety and co-principal debtor, jointly and severally, together with Views of the Waves at Wilderness Developments (Pty) Ltd (*'the company'*)

in favour of plaintiff, a commercial bank, for any debts (limited to R4, 185 000.00), owing by the company to the plaintiff from whatsoever cause arising, together with such further amounts as may follow by way of interest and costs. The company had undertaken a hotel and property development in Wilderness. On 27 April 2011, the company was placed in business rescue in terms of sec 129 of the Companies Act, No 71 of 2008 (*'the Companies Act'*). On 21 August 2012 an amended business rescue plan for the company was presented to and adopted by creditors. In terms of the plan the business of the company would be sold as a going concern and plaintiff, as a secured creditor, would receive payment to the full extent of the realisation of its securities with the balance of its claims ranking as concurrent claims. Concurrent creditors would, however, receive no dividend, no amount being made available to concurrent creditors either on liquidation or in terms of the plan.

[3] In its combined summons plaintiff pleaded that in 2010 it entered into a written agreement with the company in terms whereof it granted it an overdraft facility and that, as at November 2011, it had claims in excess of R57mil against the company of which nearly R16mil consisted of claims in respect of the overdraft facility.

[4] It pleaded further that in terms of the business rescue plan it would receive a secured dividend of just less than R25mil and would be a concurrent creditor and receive no dividend in respect of the balance of its claim, amounting to more than R32mil.

[5] Plaintiff sought judgment against defendant in the amount R4, 185 000.00, being the limit of its suretyship obligation together with interest as well as an order declaring executable certain property owned by defendant and over which a mortgage bond had been registered in favour of plaintiff as security for defendant's obligations in terms of the suretyship.

[6] In her affidavit opposing summary judgment defendant raised a variety of defences but eventually persisted only in two of them. The main defence is that, on a proper interpretation of the business rescue plan, the company's debt to plaintiff having been extinguished, she could not be held liable for an accessory obligation arising out of the deed of suretyship which she had concluded. The second point or defence raised by defendant was that summary judgment should not be granted until plaintiff had given an account of what monies it had recovered from the company, or from various other securities which it held in the form of cessions or notarial bonds, and demonstrated that the principal debt had not been extinguished or that it was not less than the amount claimed from defendant.

THE ACCOUNTING DEFENCE

[7] I propose to deal first with the subsidiary defence which defendant seeks to raise, namely, that no summary judgment can be given until such time as plaintiff has given an accounting of all the monies which it has recovered in respect of the company's liabilities to it.

[8] To the extent that this defence was raised in the opposing affidavit it was done almost in passing and in vague terms, defendant stating that there was nothing in plaintiff's combined summons to indicate to what extent the claim against the principal debtor had been reduced or extinguished. She put up no facts or made no averments suggesting that plaintiff had recovered so much of its claim against the company that it could not rely on defendant's suretyship obligations. By contrast, as I have pointed out, in its particulars of claim plaintiff not only pleaded the full extent of its claims against the company, the secured dividend which it would receive in terms of the business rescue plan, and the fact that it would receive no dividend in respect of those of its claims as a concurrent creditor, it also pleaded that the business rescue plan was adopted and implemented and that it received the envisaged dividend. These allegations were not

disputed by defendant in her opposing affidavit. When regard is had to the pleaded allegations that the plaintiff would receive no dividend on the balance of its claims amounting to R32.5mil, including, as at November 2012, an amount of more than R18mil owing in respect of the overdraft facility which it had extended to the company, it appears highly unlikely that plaintiff's outstanding claims against the company were less than the upper limit of defendant's liability, namely, R4, 185 000.00.

[9] In terms of Rules of Court 32 (3)(b) a defendant wishing to avoid summary judgment must satisfy the Court that he or she has a bona fide defence through an affidavit which *'disclose(s) fully the nature and grounds of the defence and the material facts relied upon therefor'*. At the stage of summary judgment it is not for the Court to rule on the correctness of the facts so alleged but merely to consider whether such facts constitute a good defence in law and whether that defence appears to be bona fide. See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426. To this end the Court must be apprised of the facts upon which the defendant relies with sufficient particularity and completeness as to be able to hold that if these statements of facts are to found at the trial to be correct, judgment should be given in favour of the defendant.

[10] In the present instance defendant alleges no facts at all suggesting that plaintiff had recovered more than the R24mil as provided by the business rescue plan nor does it dispute that plaintiff's claims were initially in excess of R57mil. In argument Mr Coston, on behalf of defendant, could do no more than refer to a list of some 13 securities which the company was required to furnish in order to secure the overdraft facility which it enjoyed from plaintiff. These included defendant's suretyship obligations, in turn secured by a mortgage bond over her property. Mr Coston speculated that plaintiff could have realised any of these securities and thereby reduced the company's debts to the extent that it had recovered its claims in full against the company or at least to the

extent that its claim against defendant was reduced. All of this was, however, no more than speculation, unsupported by any facts.

[11] It is notable, furthermore, that defendant was not a stranger to the principal business of the company. She testified that she and her husband were friendly with the driving force behind the company, a Mr TG du Toit, that she furnished the suretyship at his request, that she purchased two properties in the development which was the principal business of the company. In addition she annexed correspondence between Du Toit and someone who appeared to be the representative of the business rescue practitioner, relating to the overall effect and outcome of the business rescue plan and, further, indicating the aftermath of the company's failure following the business rescue proceedings. In these circumstances one would reasonably expect that defendant would offer some indication or proffer some facts in her opposing affidavit in support of the suggestion that in fact plaintiff had, or might well have, recovered sums well in excess of those pleaded in its particulars of claim with the result that its claim against her had been extinguished or diminished. For these reasons I consider that this defence cannot ward off summary judgment.

THE EFFECT OF THE BUSINESS RESCUE PLAN ON DEFENDANT'S LIABILITY AS A SURETY

[12] As stated, the primary defence raised by defendant is that since plaintiff's claim against the company has, on a proper interpretation of the business rescue plan, been extinguished defendant's liability, being accessory in nature was, by virtue of sec 154 of the Companies Act, likewise extinguished. In raising this defence defendant relied on the judgment by Rogers J in *Tuning Fork (Pty) Ltd v Greeff and Another* 2014 (4) SA 521 (WCC).

[13] Before considering the merits of this argument it is necessary to furnish the material terms of both the business rescue plan and the suretyship concluded by

defendant. As mentioned, in terms of the business rescue plan the business of the principal debtor (the company) would be sold as a going concern and plaintiff, as a secured creditor, would receive payment to the full extent of the realisation of its securities with the balance of its claims ranking as concurrent claims. Concurrent creditors would receive no dividend.

[14] The plan stipulates, in several clauses, that the proceeds of the sale of the company's various assets, which were to be distributed to the creditors as described therein, would be *'in settlement of all claims against the respective legal entities'* and *'in full and final settlement of creditors' claims against the company or any other associated company'*.

[15] Part C of the business plan sets out its operative assumptions and conditions and include the following material clauses:

> *'6.4 The amounts made available for payment to creditors for the combined businesses in terms of this BR Plan are paid in full and final settlement of any and all claims creditors may have against the combined businesses.*
>
> *6.5 Such settlement is not intended to affect any rights that any creditor may have against any third party who had bound itself as surety, or on any basis in law, or on behalf of either Views Restaurant or Views Development.*
>
> *6.6 Secured creditors of the combined businesses will receive payment in terms of this BR Plan and will upon receipt of such payment be required to consent to the release of their respective securities'.*

[16] Defendant concluded the deed of suretyship in June 2007 wherein she bound herself as '*surety and co-principal Debtor jointly and severally together with'* the company in favour of plaintiff *'for the repayment on demand of any sum or sums of money, which the defendant owes or may hereafter owe to the Bank from whatever*

cause arising and/or the due fulfilment of all obligations of the Debtor to the Bank in respect of such indebtedness'.

[17] Under the heading '***The discretion of the Bank'*** defendant acknowledged and agreed that plaintiff could, in its discretion '*and without prejudice to its rights in terms hereof:*

> *'… 6.3 enter into any arrangement, compromise or settlement or grant an extension to the Debtor or any surety;*

[18] Under the heading '***Insolvency, Liquidation, etc'*** defendant, as surety, agreed that:

> *'8.1 if the estate of the Debtor … is sequestrated, liquidated, surrendered or placed under judicial management, administration, compromise or arrangement, either by way of statute or otherwise:*
>
> *8.1.1 the Bank may, in its discretion, decide to institute a claim against such estate and to calculate the extent of such claim, without affecting or diminishing my/our liability in terms hereof*
>
> *8.1.2 the Bank shall be entitled to apply all proceeds or payments which are received from the Debtor, Curator, Liquidator or from any other source in diminishing the amount owed, without affecting or diminishing my/our liability in terms hereof for payment of the amount which is owing to the Bank by the Debtor after receipt of such proceeds or payments;'*

[19] Under the heading ***'Renunciation of Benefits',*** defendant agreed that she was not entitled to demand cession of plaintiff's rights against the company before payment by her of the full debt owing by the company to plaintiff. Finally, a limitation clause provided that the amount that plaintiff would be entitled to recover from defendant under the suretyship would be limited to a maximum of R4 185 000.00 *'together with such further amounts in respect of interests and costs as have already accrued or which will accrue until the date of payment of the amount'* and, further that, in the event that she

did not fulfil her obligations in terms of the suretyship by means of a payment to plaintiff, it would *'only be entitled to sell the surety's property situated at ERF 2339, South Street, Wilderness and to utilise the proceeds thereof to settle the surety's liability towards the Bank in terms of the suretyship'*.

[20] By way of background, sec 154 of the Companies Act, found in the chapter dealing with business rescue, provides as follows in respect of the discharge of debts and claims:

> *'(1) a business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.*
>
> *(2) if a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.'*

[21] The defendant's argument relied to no small extent on the judgment in *Tuning Fork*. In that matter Rogers J was called upon to determine whether sureties, against whom summary judgment was sought, had been released from their liabilities as sureties by reason of a compromise between the principal debtor, being a company which was the subject of a business rescue plan, and its creditors. The learned judge refused summary judgment holding that the business rescue plan could reasonably be construed as one in which the company as principal debtor had been discharged from its liability to the plaintiff and, since the position of the surety for the company was not addressed in the plan, the defendants had on this construction of the plan been discharged.

[22] Rogers J reached the following main conclusions in his analysis of the business rescue provisions in the Companies Act and, in particular, sec 154 thereof:

'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'.

[23] It will be seen then that Rogers J took the view that a surety of a principal debtor is released by a compromise or release effected by a business rescue plan unless the relevant deed of surety provides otherwise or the claim against the surety is preserved in the business rescue plan by stipulations which are legally permissible.

[24] The rationale in *Tuning Fork* has been questioned recently in *Newpoint Finance Co (Pty) Ltd v Nedbank Ltd* [2014] ZASCA 210 where it was suggested, in para [14],

'that sec 154 is capable of the construction that it deals only with the ability to sue the principal debtor and not with the existence of the debt itself'. If that was the case, the Court reasoned, then the liability of the surety would be unaffected by the business rescue, unless the plan itself made specific provision for the situation of sureties'. Referring to *Tuning Fork* the Court, per Wallis JA states *'that it is by no means clear to me that '(the reasoning of Rogers J) is correct'*. These remarks were *obiter* and therefore, ordinarily, I am obliged to follow the judgment of Rogers J unless I consider that it is clearly wrong. However, I regard it as unnecessary for me to express a view one way or the other since, in my view, in the present instance, in terms of the approach adopted in *Tuning Fork,* defendant, notwithstanding the compromise reached with the company in the business rescue plan, remains liable as surety by reason of the suretyship's particular terms and/or by reason of the provisions in the business rescue plan preserving the creditor's right of recourse against the surety.

[25] In *Tuning Fork* Rogers J referred to the general legal position in our law that the extinction of the principal obligation extinguishes the obligation of the surety which also finds application where the principal debt is discharged by settlement or is extinguished by prescription. He discussed the reasoning adopted by Dove Wilson J in *Wides v Butcher and Sons* (1905) 26 NLR 578 where it was held that 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 having that effect *'because it rebuts the presumption which ordinarily exists that if you liberate the principal debtor, you mean to liberate also the surety, and it is also has the effect of preserving the right of recourse by the surety against the principal debtor'*. As Rogers J put it '*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'.

[26] Under the present suretyship the surety agreed that in the event of a range of circumstances, including judicial management, administration, compromise or arrangement, either by way of statute or otherwise, the plaintiff could, in its discretion, institute a claim against such estate and to calculate the extent of such claim *'without effecting or diminishing my/our liability in terms hereof'*. The wide range of circumstances envisaged in this clause would seem to quite easily encompass a business rescue plan notwithstanding that such proceedings may have been introduced into our law only after the suretyship agreement was concluded. Secondly, that clause (8.1.1) in my view clearly envisages a situation in which the bank (plaintiff) might compromise its claim against the principal debtor (the company) by way of such an arrangement without necessarily forfeiting its right to proceed against the surety for any monies still outstanding by virtue of its pre-existing claim against the principal debtor.

[27] The conclusion that plaintiff reserved its right to proceed against defendant, as surety, notwithstanding a compromise or settlement of its claim against the company is strengthened by the provisions of clause 6.3 which expressly permit plaintiff *'without prejudice to its rights*' to *'enter into any arrangement, compromise or settlement or grant an extension to the Debtor…'*

[28] Even if I am wrong in my conclusion that the plaintiff's right to proceed against the surety is, in the present circumstances, preserved by the terms of the suretyship agreement, I consider that the provisions of the business rescue plan put the matter beyond any doubt.

[29] In considering the argument that, without finding that it is a necessary implication of the business rescue provisions that rights against sureties are safeguarded failing which such plans are unworkable, Rogers J cited the various possibilities which would have presented themselves to the law-maker had it chosen to deal with the matter expressly. One of those possibilities was that the law-maker might have decided to leave it to the stakeholders to regulate the position of sureties by appropriate provisions in the business rescue plan.

[30] The learned judge found in fact that, given the absence of the implied term in the new Act contended for by the creditor, that is the effect of the term as it stands. In this regard he stated '*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 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.* The learned judge cited another possibility relating to the terms of the suretyship agreement itself when he said '*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'.*

[31] In my view this was clearly the path which was followed by the parties in the present matter when they agreed (in clause 6.5 of the business rescue plan) that the settlement which they reached through the business rescue plan was *'not intended to affect any rights that any creditor may have against any third party who had bound itself*

as surety … for and on behalf of it (the company)' and when they included paras 6.3 and 8.1 in the deed of suretyship.

[32] Mr Coston, on behalf of defendant had no convincing answer to the existence and provisions of the clause cited above. He pointed out that defendant had not attended any meeting of the creditors nor voted for the adoption of the business rescue plan and argued that it was not open to the other creditors who adopted the plan, *'to legislate away the defendant's common law rights and to preclude her from relying on her accessory position as a surety'*. That proposition, however, begs the question as to whether any rights which defendant had under the common law, were removed. In the light of the terms of the suretyship and the business rescue plan, as cited above, this was not the case. The agreement between plaintiff, as one of the creditors, and the company, expressed through the business rescue plan was no more than a *pactum de non petendo* and the surety in turn must be held to have preserved her right of recourse against the principal debtor. To the extent that sec 154 of the Companies Act is applicable, and to the extent that in proceeding against defendant plaintiff is *'enforcing any debt owed by the company immediately before the beginning of the business rescue process'*, the proviso to sec 154 *'except to the extent provided for in the business rescue plan'* clearly permits this.

[33] It is so that, read on its own, clause 6.4 could be construed as an unconditional discharge or release subject only to payment of the dividend in question to the creditors and having the result that any accessory obligations are also extinguished. However, clause 6.4 cannot be read alone and, when read with clause 6.5, must clearly be construed as nothing more than a *pactum de non petendo* preserving plaintiff's right to proceed against sureties including defendant.

[34] Further reasons advanced by Mr Coston as to why defendant's accessory obligation must be regarded as extinguished hold no water either. These included that the company had no assets and liabilities, that the amended business rescue plan did not contain a clause retaining defendant's right of recourse against the company and that defendant was prejudiced as her right of recourse against the company was valueless. The first and third reason are the same and amount to no more than surrounding circumstances; a surety's right of recourse is not conditional upon the principal debtor having the resources to meet any judgment which a surety might obtain pursuant to such right. As regards the second reason, the preservation of defendant's right of recourse against the company is a clear implication of the relevant provisions of the business rescue plan and follows as a matter of law. It does not have to be spelled out in so many words.

[35] Finally, Mr Coston contended that in view of the conflicting interpretations of the amended business rescue plan, summary judgment ought to be refused. He also contended that evidence heard at the trial might shed further light on the proper interpretation of the business rescue plan. He was, however, unable to give any indication of what evidence might be forthcoming or how it might affect the interpretation of the business rescue plan with the result that I consider this argument to be speculative. In *Tuning Fork* Rogers J considered that, since he was dealing with a summary judgment application, he could not grant judgment unless satisfied that the business rescue plan was not reasonably capable of an interpretation that the company's indebtedness to the plaintiff had been discharged. Applying this test, which appears logical, I am satisfied that the present business plan is not reasonably capable of an interpretation that the company's indebtedness to it has been discharged and thus that the surety's accessory obligations has also been extinguished. Accordingly, in my view, plaintiff is entitled to summary judgment in the amount of R 4 185 000.00.

[36] Further relief sought was for interest on the principal sum from 6 November 2012 to date of payment at the rate of 17.75% per annum. Plaintiff's counsel, Mr Olivier, was unable to direct me to any provisions either in the deed of suretyship or the banking facility agreement which made provision for interest at this rate. The suretyship agreement referred only to interest *'already accrued or which will accrue until the date of payment of the amount'.* The facility agreement referred to interest at prime + 1.25%, further recording that prime was at that stage 9.5%. I do not consider that the uncertainty over the exact rate of interest applicable is resolved by a certificate of balance indicating that the rate of interest sought, 17.75% (made up of a prime rate of 8.5% to which was added 9.25% per annum), particularly where there is no apparent agreement that any such rate could be charged. In the result I consider that this relief must stand over for later determination.

[37] Finally, plaintiff sought an order that the property mortgaged by defendant in its favour pursuant to the suretyship agreement be declared executable. The agreement provided that in the event that defendant did not fulfil her obligations in terms thereof plaintiff would be entitled to sell the property in question. Defendant stated in her opposing affidavit that this property constituted her and her husband's family home but made no further submissions regarding an order declaring the property executable. Given the express terms of the suretyship agreement I consider that the plaintiff is entitled to an order of executability but may only act on this in the event that the surety does not otherwise satisfy the judgment.

[38] In the result the following order is made:

1. *Summary judgment is granted against defendant in the sum of R4 185 000.00;*

2. *Plaintiff's claim for interest on the aforesaid sum is reserved for determination by a trial court and defendant is granted leave to defend this claim;*

3. *Erf 2339 Wilderness, in the municipality and division of George, Western Cape Province, in extent 687m², held by deed of transfer no T3002/2006 is declared executable but such order may itself only be executed in the event that the defendant is otherwise unable to satisfy the judgment granted under prayer 1 above;*

4. *Plaintiff is awarded the costs of suit on the scale as between attorney and client save for the costs arising out of the postponed hearing of this matter on 10 March 2015.*

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BOZALEK J

APPEARANCES

For the Plaintiff:	Mr LM Olivier SC
	Instructed by:
	Marais Muller Yekiso
For the Defendant:	Mr P Coston
	Instructed by:
	B & T Attorneys