THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE

Case no: 30/2014

In the matter between:

NEW PORT FINANCE COMPANY (PTY) LTD **First Appellant**

DAVID CARL MOSTERT **Second Appellant**

and

NEDBANK LIMITED **Respondent**

(WCHC Case No 20896/2010)

and in the matter between:

DAVID CARL MOSTERT **First Appellant**

NEW PORT FINANCE COMPANY (PTY) LTD **Second Appellant**

and

NEDBANK LIMITED **Respondent**

(WCHC Case No 22331/2010)

Neutral citation: *New Port Finance Company (Pty) Ltd v Nedbank Ltd* (30/2014)[2014] ZASCA 210 (1 December 2014)

Coram: Navsa ADP, Majiedt, Wallis, Saldulker and Zondi JJA

Heard: 25 NOVEMBER 2014

Delivered: 1 December 2014

Summary: Companies undergoing business rescue in terms of Companies Act 71 of 2008 – effect of business rescue on obligations of sureties discussed – section 154 of Act – interpretation of deed of suretyship

ORDER

On appeal from: Western Cape High Court (Blignault J sitting as court of first instance):

The appeals are dismissed with costs such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Navsa ADP, Majiedt, Saldulker and Zondi JJA concurring)

[1] Wedgewood Village Golf and Country Estate (Pty) Ltd (Wedgewood) and Danger Point Ecological Development Company (Pty) Ltd (Danger Point) both borrowed money from the respondent, Nedbank Ltd (Nedbank) for the purposes of pursuing two property developments. The loans in both instances were secured by deeds of suretyship executed by the appellants, New Port Finance Company (Pty) Ltd (New Port) and Mr David Mostert, the sole director of New Port.[1] Wedgewood and Danger Point defaulted on their obligations to Nedbank and in 2010 it instituted separate proceedings against each of them and New Port and Mr Mostert. On 27 September 2011, judgments were entered in favour of Nedbank against Wedgewood and the two sureties jointly and severally, the one paying the other to be absolved, for some R55 million, interest and costs, and against Danger Point and the two sureties, also jointly and severally, for a little over R10 million, interest and costs. Thereafter Nedbank obtained provisional and final liquidation orders against Wedgewood and Danger Point.

[1] In the case of Wedgewood there were other sureties but that is irrelevant for present purposes.

[2] On 29 March 2012 Nedbank launched an application for Mr Mostert's sequestration and on 17 May 2012 it launched an application for New Port's liquidation. The present appeals arise because Mr Mostert and New Port sought to prevent Nedbank from pursuing those applications. They relied for the relief they sought on the fact that both Wedgewood and Danger Point had been taken out of liquidation, placed under supervision under orders of court granted in terms of s 130(1) of the Companies Act 71 of 2008 (the Act), and business rescue plans had been adopted, become final and were being implemented in respect of both companies. In those circumstances, in separate applications, the one relating to Wedgewood and the other to Danger Point, Mr Mostert and New Port applied for orders interdicting Nedbank from taking any further steps against them in relation to the enforcement or execution of the two judgments, including pursuing the applications for their respective sequestration and liquidation. The orders were to be final unless the business rescue plans proved unsuccessful and were terminated in one of the ways provided in terms of the Act. Blignault J dismissed their applications in the high court, but granted leave to appeal to this court.

[3] Two arguments were advanced on behalf of Mr Mostert and New Port. The first was that the terms of the business rescue plans, which were binding on Nedbank, altered the obligations of the principal debtors, Wedgewood and Danger Point. This, so it was argued, had the effect as a matter of law of altering the obligations of Mr Mostert and New Port as sureties for the debts of Wedgewood and Danger Point, so as to render them liable for no more than the obligations of Wedgewood and Danger Point under the business rescue plans. Accordingly, the argument proceeded, they were no longer liable immediately to satisfy the

judgments taken against them, because the principal debtors had been given time to pay the same debts, and if the business rescue proved successful in each case their obligations to Nedbank would be discharged because the obligations of Wedgewood and Danger Point would have been discharged.

[4] The alternative argument was that the court should in any event grant a stay of execution on the two judgments, either in terms of its common law powers, or in terms of rule 45A of the Uniform Rules of Court, in order to prevent them suffering a grave injustice. They said that it would be unfair to permit Nedbank to pursue execution on the judgments when there was a possibility that the successful implementation of the business rescue plans would result in the complete discharge of the debts by Wedgewood and Danger Point. In addition Mr Mostert claimed that his own and New Port's involvement in the business rescue plans was integral to their success and his sequestration would hinder that.

[5] An immediate difficulty confronted both Mr Mostert and New Port arising from events subsequent to the hearing in the court below. According to affidavits delivered shortly before the appeal and admitted without opposition, the business rescue in relation to Wedgewood had failed and Nedbank had given notice to the business rescue practitioner to terminate it and to dispose of the assets. In the order sought in the court below it was accepted that in that eventuality there could be no bar to the sequestration of Mr Mostert's estate and the liquidation of New Port.

[6] Mr Mostert and New Port sought an interdict against execution being levied against them and particularly an interdict prohibiting the

continuation of the sequestration and liquidation applications. The interdict was to be made conditional ('unless') on certain events occurring, in which event it would fall away. Two of those events were the business rescue proceedings being terminated in terms of s 132(2)*(a)* of the Act or Nedbank becoming entitled to call on the business rescue practitioner to dispose of the assets of Wedgewood where there had been a failure to pay it in accordance with the business rescue plan, or the plan had not been complied with, or the conditions in the plan had not been fulfilled. Nedbank delivered an affidavit saying that these events had occurred and that they rendered the appeals moot. In an affidavit delivered in response to this, Mr Mostert accepted that there had been a default under the Wedgewood business rescue plan. This meant the fulfilment of the conditions that would cause the proposed interdict to fall away. All that he could proffer as a reason for continuing with the appeals was the possibility or more accurately the hope that some fresh compromise could be reached with Nedbank.

[7] These events effectively spelled the end of the appeal so far as the Wedgewood business rescue plan was concerned. In turn that meant that Nedbank can pursue Mr Mostert's sequestration and New Port's liquidation on the basis of the judgment it obtained against them jointly with Wedgewood. That destroyed the underlying rationale for the application for an interdict, in similar terms and subject to similar conditions, based on the Danger Point judgment. In the founding affidavit in the Danger Point application, Mr Mostert said that the application was precipitated by Nedbank's election to continue with the sequestration and liquidation applications. Once Nedbank was free to pursue those applications, based on the judgments in relation to the Wedgewood development, no purpose would be served by an order interdicting it from

doing so, in the wording suggested by counsel 'in reliance on any claim made under' the judgment in the Danger Point case. If Nedbank is free to pursue these applications it cannot be prevented from doing so by an order in the terms suggested. That order would amount to a pointless restraint – a *brutum fulmen*.

[8] The appeals must therefore be dismissed on that ground alone. However, the matter has been fully argued, the issues are of some general importance and that would in any event have been their fate, even had intervening circumstances not rendered the two applications pointless. In those circumstances it is appropriate to state briefly why that would have been the result. At the heart of the submissions on behalf of Mr Mostert and New Port was the proposition that the successful outcome of the business rescue proceedings would be that the sureties would have been relieved of any indebtedness to Nedbank over and above the payment of the amounts already received by Nedbank under those two plans. For various reasons that would not have been the case.

[9] The first reason is that Nedbank had obtained judgments that served to fix the liability of the sureties. There were no grounds for rescinding those judgments nor any attempts to do so and they had become final, with no avenue open for them to be challenged on appeal. Even if it is accepted that they did not novate the claims under the deeds of suretyship, but merely strengthened those claims and replaced the right of action on the deeds of suretyship by a right to execute on the judgment,[2] the fact remained that the liability of the sureties was thereby established. If any payment was made by the principal debtor thereafter that would enure to the benefit of the sureties, but that would follow from

[2] *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 942C-E.

the fact that the judgment established joint and several liability so that, in the time honoured expression, if the one paid the others would be absolved. But we were referred to no authority and I have discovered none, in which it has been held that a compromise of the principal debtor's liability under the judgment, whether as a result of business rescue or otherwise, would accrue to the advantage of the surety after judgment had been taken against them. There can be no question of the surety's rights or interests being prejudiced thereby,[3] because the extent of the surety's liability for the debt in question has been fixed and determined. How the creditor thereafter sets about executing the judgment against the principal debtor does not affect either the nature or the extent of the surety's liability.

[10] The second reason is that the terms of the deeds of suretyship in this case, as is frequently the situation, had been drafted so as to cater for this very eventuality. Clauses five, six and seven entitled the bank to pursue the sureties notwithstanding their dealings with the principal debtor and the grant of any extension of time, or any compromise in relation to the scope and extent of the principal debtor's indebtedness. Any default on the part of the principal debtor entitled the bank to sue the sureties. The benefit of excussion was waived. I will not lengthen this judgment by quoting the clauses. They were relatively standard clauses to be found in most commercial deeds of suretyship.

[11] Clause five is in similar terms to the clause in the deed of suretyship that was in issue in *Cape Produce Co (Port Elizabeth) (Pty)*

[3] *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) paras 18-21.

Ltd v Dal Maso and Another NNO.[4] There, a power to give time to or release the principal debtor 'without prejudice to its rights hereunder' was held to entitle the creditor to demand immediate payment from the surety, notwithstanding its having subordinated its claim against the principal debtor in favour of other creditors. Similarly here, the fact that the bank agreed, by way of its agreement to the business rescue plans, to give Wedgewood and Danger Point time to pay their indebtedness to it and, conditional on them doing so, agreed to limit the amounts that would be paid to them, fell squarely within clause five.

[12] Of necessity therefore it had to be argued that the liquidation of Wedgewood and Danger Point had altered the situation. But that only brought clause six into sharper focus. It identified four broad situations when its terms would apply. They were liquidation, judicial management under the Companies Act 61 of 1973, the submission of an offer of compromise by the debtor and the submission of a scheme of arrangement by the debtor. If any of those events occurred, clause six entitled Nedbank to accept any dividend on account or any alternative securities arising out of that event and 'to recover from the surety, to the full extent of this suretyship' any sums remaining owing thereafter. In other words, the fact that in any of those situations the principal debtor would be released in whole or in part from its obligations would not disentitle the bank from recovering the outstanding amount from the sureties. Neither suggestion by counsel as to ways in which this could be avoided held water. In particular the suggestion that a clause in these terms did not encompass business rescue – an institution that did not exist under that name when the deeds were executed – was incorrect.

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[4] *Cape Produce Co (Port Elizabeth) (Pty) Ltd v Dal Maso and Another NNO* 2002 (3) SA 752 (SCA) paras 9 to 11.

[13] Counsel eschewed any contention that the sureties were entitled to the benefit of the statutory moratorium afforded Wedgewood and Danger Point under s 133(1) of the Act. He was right to do so.[5] He also did not go so far as to contend that the effect of the business rescue provisions in ss 128 to 154 of the Act is to deprive creditors of the company of their rights against sureties under the deeds of suretyship by which they have bound themselves for the debts of the company, although that was implicit in his argument that the debts owed by the sureties were altered by the terms of the business rescue plans and would ultimately be discharged if the plans succeeded. He fortified this argument by reference to the judgment of Rogers J in *Tuning Fork*,[6] which in turn was largely based on the learned judge's reading of the decision in *Moti and Co v Cassim's Trustee*.[7]

[14] As the case will be disposed of on the grounds already set out above it is inappropriate to explore in detail the reasoning of Rogers J. I simply record that it is by no means clear to me that it is correct. *Moti and Co v Cassim's Trustee* was decided on the basis of the court's interpretation of a specific provision in the 1916 Insolvency Act[8] that has no direct counterpart in the Act. The key provision in that regard is s 154, which, in subsec 1, simply says that in certain circumstances a creditor will not be able to enforce a debt against a company in business rescue and, in subsec 2, says that the company may enforce a debt in accordance with and to the extent permitted by the terms of the business rescue plan. That section is capable of the construction that it deals only with the

[5] *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) paras 17-19.
[6] *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff and Another* 2014 (4) SA 521 (WCC) paras 14(i) and (ii).
[7] *Moti and Co v Cassim's Trustee* 1924 AD 720.
[8] Section 126(2)*(b)* of the Insolvency Act 32 of 1916.

ability to sue the principal debtor and not with the existence of the debt itself. If that is the case 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.

[15] There was also a contention that the court should have exercised a discretion to stay the enforcement of the judgments granted against Mr Mostert and New Port pending the outcome of the business rescue plans. That became academic once the Wedgewood plan failed and, if the large debt in that case can be enforced, there seems to be little reason to postpone enforcement of the far smaller debt in Danger Point.

[16] On every ground advanced before us therefore the appeals must fail. It is unnecessary therefore to consider the criticism directed at the judgment of the high court, as the result it reached was correct. We were asked to award Nedbank the costs of three counsel on the grounds that the case involved a lot of money; that there was an attack on its standard form of suretyship and that the implications of business rescue are important to the bank and the wider commercial community. Whilst all that is correct it is true of much litigation that comes to this court and it does not warrant the employment of three counsel. The additional costs incurred thereby are an expense that the bank must bear.

[17] The appeals are dismissed with costs, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	Paul Farlam (with him Grant Quixley) Instructed by: John Taylor & Associates Inc, Cape Town; Webbers, Bloemfontein
For respondent:	Schalk Burger SC (with him Brendan Manca SC and Stephan Wagener) Instructed by: Cliffe Dekker Hofmeyr, Cape Town; Honey Attorneys Inc, Bloemfontein.