

SOUTH AFRICA / JUDGMENT

Botes and Another v Hitachi Construction Machinery Southern Africa Co (PTY) LTD (205/2018) [2020] ZANCHC 4 (13 March 2020)

[2020] ZANCHC 4

COURT

Northern Cape High Court, Kimberley

BEFORE

Williams

CASE / FILE NUMBER

205/2018

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Reportable:	Yes/No Circulate
to Judges:	Yes/No Circulate
to Magistrates:	Yes/No IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE HIGH COURT, KIMBERLEY) CASE NO.: 205/2018 Date heard: 24-10-2019 Date delivered: 13-03-2020 In

the matter between:

Wiets
Jacobus
Botes
1st Applicant/ 1st Respondent
Martin
Van
Zyl
2nd Applicant/ 2nd Respondent
And
Hitachi Construction
Machinery
Respondent/Applicant
Southern Africa CO (PTY) LTD

CORAM:

WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. This is an application for leave to appeal to the Supreme Court of Appeal against my judgment of 15 March 2019 wherein I ordered inter alia that the applicants (as sureties) pay the respondent (as creditor) the outstanding pre-business rescue debt and post-commencement

financing debt owing to the respondent after Blue Chip Mining and Drilling (Pty) Ltd (the principal debtor), had been released from its obligations to the respondent following the acceptance and implementation of a business rescue plan.

2. The grounds of appeal are briefly as follows:

2.1 That I erred in following the obiter dictum in *Newport Finance Company (Pty) Limited and Another v Nedbank Limited* 2016

- (5) SA 503 (SCA), where the terms of the suretyship in casu are completely different to those considered in *Newport*. The result being a judgment in conflict with the judgment of Rogers J in *Tuning Fork (Pty) Limited t/a Balanced Audio v Greef and Another* 2014(4) SA 521 (WCC); and

2.2 That I erred in finding that the business rescue practitioner validly admitted the principal debtor's indebtedness.

3. With regard to the first ground of appeal, there is no substance in the argument that my judgment is in conflict with the judgment in *Tuning Fork*. In that matter Rogers J was confronted with a situation where the suretyship did not stipulate the position of the sureties upon a compromise with the principal debtor. (See paragraphs 1 and 14 (iii) of the *Tuning Fork* judgment.)

4. The Newport judgment dealt with a situation as the one in casu. I have referred to its applicability herein in paragraphs 13 to 16 of the main judgment. I stand by my reasons in this regard.

I am therefore not of the opinion that an appeal on this ground would have a reasonable prospect of success.

5. With regard to the second ground of appeal i.e. the argument that the business rescue practitioner could not validly acknowledge or admit the indebtedness of Blue Chip, I refer in addition to my reasons in paragraphs 20 to 21 of the main judgment, to *Two Sixty Four Investments (Pty) Ltd v Trust Bank 1993*

- (3) SA 384 (W) at p 387 thereof, where Leveson J stated the following:

“Lastly, on this aspect, clause 9 of the deed of suretyship provides that the surety is bound by all admissions of liability made by the principal debtor. It seems to me that the acceptance of the respondent’s claim, not merely by the liquidators, but by creditors in the second creditors’ meeting of the insolvent company, acting as the organ of the Company in a like sense to that used by Gower in his well-known text on Modern company Law, of the board of directors or the members in general meeting as the organ of the company, is such an admission. The applicant would be bound thereby.”

6. Although this pronouncement by Leveson J was said in relation to liquidations, the principle would be applicable to business rescue proceedings as well.

This ground of appeal also has no merit.

The following order is made:

The application for leave to appeal is dismissed with costs.

CC WILLIAMS

JUDGE

For Applicants: Adv E L Theron SC

(Respondents in main) Louw & Da Silva Attorneys

c/o Engelsman Magabane Inc

For Respondent: Adv J M Hoffman

(Applicant in main) Cliffe Decker Hofmeyer Inc

c/o Duncan & Rotman

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Prepared on 9 October 2026 · Esheria