

SOUTH AFRICA / JUDGMENT

Nexus AG (Pty) Ltd v Alexander and Another (680/2021) [2021] ZAFSHC 167 (1 July 2021)

[2021] ZAFSHC 167

COURT

Free State High Court, Bloemfontein

BEFORE

P. J Loubser

CASE / FILE NUMBER

680/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case

number: 680/2021

In

the matter between:

NEXUS
AG (PTY)
LTD Applicant
and
DEREK
NORMAN
ALEXANDER First
Respondent
MARIA
MAGDALENA ALEXANDER Second
Respondent
HEARD

ON:

3 JUNE 2021

JUDGEMENT

BY: LOUBSER, J

DELIVERED ON: 1 JULY 2021

- [1] This is an application for the provisional sequestration of the First Respondent. The First and Second Respondents are husband and wife, and the Second Respondent is only cited as she may have an interest in the relief sought. Although only the First Respondent filed a notice of intention to oppose, it is clear from the papers filed in the application that both the Respondents are opposing the application.
- [2] The Applicant alleges that the First Respondent is factually insolvent, in that he was unable to pay his debts as they fell due. In alleging as such, the Applicant is relying on Section 10 of the Insolvency Act 24 of 1936, which section provides for the circumstances under which a court may make an order sequestrating the estate of a debtor provisionally. It provides that:
- “If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie –*
- (a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and
 - (b) the debtor has committed an act of insolvency or is insolvent; and
 - (c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, it may make an order sequestrating the estate of the debtor provisionally.”
- [3] Subsection (1) of Section nine referred to, provides that a “creditor who has a claim for not less than R100 against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor”. It is therefore clear that all that is required for a provisional order of sequestration, is proof of the three elements mentioned in Section 10 on a prima facie basis.[1]
- [4] However, the application has complications in that the First Respondent owes his liability to the Applicant in his capacity as a surety of the debtor. The debtor is a company by the name of Remitto (Pty) Ltd. Remitto is presently in business rescue, and its creditors have already adopted a business rescue plan for the company. The issue to be resolved in the application is whether the adoption of the rescue plan had the effect of releasing the sureties from their obligations. The Applicant contends that it did not, while the Respondents contend that it did.
- [5] It appears from the papers before me that the Applicant is a company providing crop care services to farmers. It distributes its products through various distributors, of which Remitto was one. According to the Applicant, the First Respondent does not own any immovable

property. Remitto, however, owes the Applicant an amount of R1 051 387.95 plus interest. The First Respondent has bound himself as surety and co-principal debtor for the debt of Remitto to the Applicant. The debt in the amount owed by Remitto, is for goods sold and delivered to Remitto by the Applicant at the special instance and request of Remitto.

- [6] During October 2020 the Applicant found that Remitto was not paying its debts regularly. On 20 October the First Respondent sent an e-mail to the Applicant stating that Remitto had cash flow problems and could not settle its account. The e-mail further stated that Remitto would pay 50% of the outstanding amount on 30 November 2020 and the remaining 50% on 31 December 2020. The Applicant granted the indulgence, but no payments were made as promised.
- [7] On 30 December 2020 Remitto filed for business rescue. The Applicant contends that, since then, the First Respondent could have paid the debt, but he did not. It must therefore be inferred that the First Respondent is factually insolvent, the Applicant says. It is further stated by the Applicant that it is up to the First Respondent to now disclose his assets and liabilities to avoid provisional sequestration. In any event, if the First Respondent is sequestrated, then assets may be found to benefit creditors, the Applicant asserts.
- [8] In reply, the First Respondent raised a number of technical objections, such as that there was no valid agreement between the Applicant and Remitto for the sale of goods, that the Applicant did not plead who acted on its behalf when the purported agreement was concluded, or where it was concluded, and that the terms of the purported agreement as alleged in the founding affidavit did not correspond with the terms as set out in the agreement itself. In my view, none of these objections carry any weight in view of the fact that the debt of Remitto and the fact that the First Respondent is a surety for that debt, is common cause between the parties.
- [9] The First Respondent further objected to the effect that the deponent to the founding affidavit gave no indication that he was authorised to institute the sequestration proceedings or to depose to the founding affidavit. In its replying affidavit, the Applicant rectified these shortcomings, with the result that they are no longer relevant.
- [10] In addition, the First Respondent pointed out that the rescue plan adopted by the creditors of Remitto had the result that the Applicant can claim no more than 10c in the Rand from Remitto. Also in the rescue plan the creditors have agreed to suspend enforcement of the sureties for as long as the “agterskot” payment is made, that is contingent upon the successful outcome of a damages claim of Remitto against one of its suppliers. If the “agterskot” provides 100c in the Rand, then nothing remains to be enforced against the First Respondent. As things now stand, the claim of the Applicant is at best the amount of R102 913.80 in terms of the rescue plan. According to the First Respondent, the Applicant has not proved that he cannot pay that amount. Furthermore, the 10c in the Rand is not liquid, since the further payment of the “agterskot”

could well have an effect on that percentage.

- [11] These are then the facts upon which the outcome of this application hinges. As a point of departure, it is apposite to consider the terms of the deed of suretyship signed by the First Respondent on 23 April 2020. The first clause reads that the First Respondent bound himself as surety and co-principal debtor for the due and prompt performance of any obligation and/or payment to Nexus by Remitto of any amount that now or in future will or may be owed to Nexus by Remitto, whatever the cause of debt. In the second clause the First Respondent renounced the benefits of excussion and division.
- [12] The fourth clause provided that the First Respondent acknowledges that Nexus shall at all times be entitled, without any reference to him, to enter into an agreement with Remitto in respect of the modification of any terms, provisions or conditions as well as to waiver of any rights thereunder and to grant postponement in respect of the time allowed for the payment of Remitto's debt and interest thereon, without such consent negating the rights of Nexus under this deed of surety, and he confirms that the aforementioned amendment, waiver or postponement shall not be considered a novation of Remitto's debt and he shall therefore not be exempted from his obligations in terms of the deed of surety.
- [13] The fifth clause provided for a certificate of balance, signed by a director of Nexus, constituting proof of the amount owed by the surety at any time. The seventh clause provided that, notwithstanding any interim settlement of any amount owed to Nexus by Remitto, the suretyship would endure as ongoing security until Nexus released the surety in writing.
- [14] As regards these clauses contained in the deed of suretyship, it needs mentioning that a certificate of balance, duly signed by a director of the Applicant, confirming that the balance owed by the First Respondent to Nexus amounted to R1 051 387.95, was issued by the Applicant on 5 February 2021. Also, it needs mentioning that the Applicant did not attend the meeting of creditors where the business rescue plan was adopted. However, Section 152(4) of the Companies Act 71 of 2008 provides that a business rescue plan that has been adopted, is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person (a) was present at the meeting (b) voted in favour of adoption of the plan; or (c) in the case of creditors, had proven their claims against the company. The effect of this subsection is obviously that Remitto, Nexus and every holder of Remitto's securities are all bound by the terms of the rescue plan.
- [15] On the other hand, when the deed of suretyship is considered, it is clear that it took account of the possibility of a compromise of the principal debt as between Nexus and Remitto. Should this occur for whatever reason, the fourth clause provided in express terms that this would not have the effect of negating the rights of Nexus in terms of the deed of suretyship, nor of being a novation of Remitto's debt, with the result that the surety would not be exempted from his obligations in terms of the suretyship. Upon a proper interpretation of

clause four, it is clear that the business rescue plan compromised the principal debt as between Nexus and Remitto but that this did not have the effect of negating the rights of Nexus in terms of the suretyship. Nor did it have the effect of being a novation of the debt of Remitto, with the result that the surety would not be exempted from his obligations in terms of the suretyship. The obligation here is the obligation to pay the amount specified in the certificate of balance.

[16] Plasket, J came to the same conclusion as far as a similar deed of suretyship was concerned in Nexus AG (Pty) Ltd vs GJ and Y Coetzer.[2] In that case, though, the business rescue plan did not deal with the liabilities of sureties one way or the other. The conclusion is also consistent with that of Wallis, JA in New Port Finance Company (Pty) Ltd and Another v Nedbank Limited[3], in respect of a similarly worded deed of suretyship. In the present case the situation is somewhat different in that the business rescue plan at least appears to deal with the liabilities of the sureties.

[17] Clause 2.3.1.5 of the business rescue plan provides that: “The Company has secured creditors at the time of publishing this plan as set out in the table below. The Directors provided personal sureties for the benefit of the Company. The plan anticipates that the creditors suspend enforcement of their sureties as long as the agterskot payments are to be made as set out in the plan. The agterskot payment structure is set out in Part B of the plan.” In relation to these words, it is significant that the Applicant is not one of the parties listed in the clause which applies to secured creditors only. Furthermore, the clause states that the plan “anticipates” that the creditors will suspend enforcement of their sureties, which does not constitute a condition of acceptance of the plan. The anticipation that creditors would suspend enforcement, is dependent

on agterskot payments being made. Therefore, there is no absolute prohibition on such enforcement. In any event, there is no evidence

that those agterskot payments have been made, or are being made.

[18] Clause 2.3.1.6 of the plan provides that: “Any contract executed in relation to any cession, collateral, suretyship, lien or any other kind of security arrangement, executed by the Company, which seeks to secure monies owed by Remitto (Pty) Ltd prior to the date of the Business Rescue Plan, will be cancelled on payment in full to the relevant creditors in terms of the adopted Business Rescue Plan.” This clause does not appear to assist the First Respondent, because there is no evidence that there had been full payment to the creditors in terms of the adopted rescue plan.

[19] In the recent judgement in Martin van Zyl v Auto Commodities[4] the Supreme Court of Appeal, per Wallis, JA interpreted Section 154(2) of the Companies Act 91 Of 2008 in a case where the business rescue plan did not mention claims by creditors against sureties. The subsection provides that 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. The Court came to the conclusion that Section 154(2) does no more than preclude creditors from pursuing claims against the company after the business rescue plan had been implemented. It does not affect or extinguish the liability of a surety for the debt.

- [20] Wallis JA also stated the following:[5] “A final consideration is that we are enjoined by section 39(2) of the Constitution to interpret section 154(2) in the manner that best promotes the spirit, purport and objects of the Bill of Rights. It seems to us that the rights of a creditor under a deed of suretyship constitutes property within the meaning of that expression in Section 25(1) of the Constitution. If Section 154(2) is construed in the manner for which Mr van Zyl contends the effect of the section will be to bring about a deprivation of property and to do so without any outward expression that this is its effect. The ordinary creditor, in possession of a deed of suretyship and confronted with a business rescue plan and Section 154(2), would not read the section as providing that the deed of suretyship would be rendered worthless on adoption and implementation of the plan. This supports the conclusion that the section does no more than render the debt unenforceable to some extent against the debtor, but leaves the suretyship untouched.”
- [21] In the absence, then, of any clear indication that the First Respondent has been absolved from his surety obligations in terms of the business rescue plan, the principles laid down by the Supreme Court of Appeal and the other cases referred to above must be applied. The only question remaining is whether the requirements of Section 9 and 10 of the Insolvency Act 24 of 1936 have *prima facie* been shown.
- [22] Firstly the Applicant has established a claim against the First Respondent such as is mentioned in Section 9(1) of the Act. This is borne out by the certificate of balance issued by the Applicant. Secondly, I am satisfied that the First Respondent is factually insolvent. On 12 January 2021 the Applicant addressed a letter of demand to the First Respondent for payment of the amount stipulated in the certificate of balance. The First Respondent made no payment at all. In addition, he failed to set out anything regarding his financial position, and he failed to demonstrate that he was actually solvent. In such circumstances, the inference is unavoidable that the First Respondent is factually insolvent. Thirdly, the First Respondent is a director of various entities, and it can be assumed that he is receiving a salary and/or benefits from all those entities on a regular basis. Again, the inference is unavoidable that his sequestration would be to the advantage of creditors.
- [23] In the premises, the following orders are made:
1. The First Respondent’s estate is placed under provisional sequestration in the hands of the Master of the Free State High Court, Bloemfontein.

2. A provisional order is hereby issued calling upon the Respondents and any other interested party to show cause, if any, to the Court on 12 August 2021 at 09h30 why a final order of sequestration should not be granted against the First Respondent's estate.
3. This order, together with a copy of the Notice of Motion and annexures thereto, must be served on the Respondents.
4. Service of this order must be effected:
 - 4.1. On the Respondents at 95 Van Der Lingen Street, Kroonstad, Free State;
 - 4.2. On the South African Revenue Services, at its offices situated at 88 Zastron Street, Bloemfontein Central, Bloemfontein.
 - 4.3. Any registered trade union that as far as the Sheriff can reasonably ascertain represents any of the employees of the Respondent;
 - 4.4. The First Respondent's employees, if any, by affixing a copy of the order and the application to any notice board, to which the employees have access inside the Respondent's premises, or if there is no access to the premises by the employees, by affixing copy to the front gate, where applicable, failing which, to the front door of the premises from which the First Respondent resides and/or conduct any business;
 - 4.5. The Sheriff must ascertain whether the employees of the First Respondent are represented by a trade union and whether there is a notice board on the premises to which employees have access.
 - 4.6. The cost of this application will be costs in the administration of the insolvent estate of the First Respondent.

P. J LOUBSER, J

For the Applicant: Adv. A. Van Reenen

Instructed by: Basson Blackburn Inc., Paarl

Per Honey Attorneys, Bloemfontein

For the respondent: Adv. J. G. Smith

Instructed by: Christo Rheeders Attorneys, Johannesburg

Per Webbers Attorneys, Bloemfontein

/roosthuizen

[1] Paarwater v South Sahara Investments (Pty) Ltd

[2005] 4 All SA 185 (SCA) at para 3

[2] Unreported Judgement, Eastern Cape Division, Case no. 3428/2018 dated 11/06/2019

[3] 2016 (5) SA 503 (SCA) at paras 10-11

[4]

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[5] At para 44 of the Judgement.

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