

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2018/03908

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
20 December 2021
.....
SIGNATURE
.....
DATE

In the matter between:

**SMALL ENTERPRISE FINANCE AGENCY SOC LTD**  
Applicant

and

**MAROPENG DOLLETH DOYLE MODIBA N.O.  
TSHIFHIWA PATRICIA MODIBA N.O.  
TSHIFHIWA PATRICIA MODIBA  
MAROPENG DOLLETH DOYLE MODIBA  
MANTHLWA MANAGEMENT SERVICES CC  
MPEPULE TRADING 100 CC**

First Respondent  
Second Respondent  
Third Respondent  
Fourth Respondent  
Fifth Respondent  
Sixth Respondent

**Delivered: 20 December 2021 - This judgment was handed down electronically.**

**JUDGMENT**

**Karachi AJ:**

## **Introduction**

1. In December 2015 and July 2016, the applicant loaned a private company, Deline Investments (Pty) Limited (“Deline”) the sum of R 900 000,00 and R2 500 000, 00 million respectively pursuant to two loan agreements. The first to sixth respondents bound themselves as sureties and co-principal debtors for all sums owing to the applicant by Deline in terms of the loan agreements.
2. Deline subsequently defaulted on payment and the applicant instituted legal proceedings against Deline as well as the remainder of the respondents under the above case number. At the time, Deline was cited as the first respondent. The parties entered into a settlement agreement which agreement was thereafter made an order of court on 29 March 2018.
3. In terms of the settlement agreement, Deline, as well as the remainder of the respondents, acknowledged that they are unequivocally liable to the applicant, jointly and severally, the one paying, the other to be absolved in respect of the two loan agreements. In the event of default, Deline and the respondents unequivocally and irrevocably consented to default judgment being taken by the applicant against them jointly and severally, the one paying, the other to be absolved, on an unopposed basis. In terms of the settlement agreement therefore, the respondents committed themselves as co-principal debtors and admitted liability to the applicant jointly and severally.

4. Deline was subsequently placed under business rescue. The applicant has launched this application against the remainder of the respondents for the balance of the amount owing to it. Its cause of action is based on the settlement agreement which was made an order of court.
5. The respondent raises a point in limine. It argues that Deline, who was initially cited as the first respondent when the settlement agreement was made an order of court, was subsequently removed as a party to these proceedings unilaterally by the applicant and that Deline ought to have been cited as a party to these proceedings. The applicant however argues that it is not necessary for Deline to be joined as a party to these proceedings because the respondents' liability to the applicant is not accessory in nature.
6. On the merits, the respondents argue that since the applicant has accepted a business rescue plan from Deline, such acceptance has an effect on the debt vis-à-vis the respondents in respect of the amount claimed.

## **Discussion**

### ***(a) Change of parties***

7. Rule 15 of the Uniform Rules of Court provides that:

*"15 Change of parties*

*(1) No proceedings shall terminate solely by reason of the death, marriage or other change of status of any party thereto unless the cause of such proceedings is thereby extinguished.*

- (2) *Whenever by reason of an event referred to in subrule (1) it becomes necessary or proper to introduce a further person as a party in such proceedings (whether in addition to or in substitution for the party to whom such proceedings relate) any party thereto may forthwith by notice to such further person, to every other party and to the registrar, add or substitute such further person as a party thereto, and subject to any order made under subrule (4) hereof, such proceedings shall thereupon continue in respect of the person thus added or substituted as if he had been a party from the commencement thereof and all steps validly taken before such addition or substitution shall continue of full force and effect: Provided that save with the leave of the court granted on such terms (as to adjournment or otherwise) as to it may seem meet, no such notice shall be given after the commencement of the hearing of any opposed matter; and provided further that the copy of the notice served on any person joined thereby as a party to the proceedings shall (unless such party is represented by an attorney who is already in possession thereof), be accompanied in application proceedings by copies of all notices, affidavits and material documents previously delivered, and in trial matters by copies of all pleadings and like documents already filed of record, such notice, other than a notice to the registrar, shall be served by the sheriff.*
- (3) *Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted.*
- (4) *The court may upon a notice of application delivered by any party within 20 days of service of notice in terms of subrule (2) and (3), set aside or vary any addition or substitution of a party thus affected or may dismiss such application or confirm such addition or substitution, on such terms, if any, as to the delivery of any affidavits or pleadings, or as to postponement or adjournment, or as to costs or otherwise, as to it may seem meet.”*

8. The rule regulates the procedure where substitution becomes necessary by reason of change of status.
9. In the matter at hand, although Deline has been placed under business rescue, the applicant does not seek any relief against Deline. The applicant

clearly states that the relief sought is against the respondents who committed themselves as co-principal debtors and admitted liability jointly and severally independently of Deline in terms of settlement agreement which was made an order of court.

10. There was therefore no need for the applicant to substitute or cite Deline (in business rescue) as a party to these proceedings.

***(b) The settlement agreement***

11. Prior to the signature of the settlement agreement, the respondents were sureties and co-principal debtors in terms of written deeds of suretyship at the time Deline signed the loan agreements. After Deline defaulted in respect of the loan agreements, a settlement agreement was concluded with the respondents and was made an order of court. The respondents signed the settlement agreement and was bound by the order.

12. The settlement agreement provides that

- 12.1. The respondents bound and interposed themselves as co-principal debtors with Deline for all monies due and owing to the applicant; and

- 12.2. In the event of default, the respondents unequivocally and irrevocably consent to default judgment being taken by the applicant against them jointly and severally the one paying the other to be absolved.

13. On a reading of the settlement agreement, the respondents' liability was not accessory in nature. The respondents concede that

13.1. it is common cause that the respondents signed the suretyship agreement as well as the settlement agreement as co-principal debtors to Deline;

13.2. the business rescue plan discharged the debt of Deline only;

13.3. liability of the respondents were not expunged by the business rescue plan.

14. I do not agree with the respondents that the effect of the business rescue plan is that the applicant's cause of action against the respondents cannot be based on the settlement agreement. Once the settlement agreement was made an order of court, the respondents were bound and continue to be bound to the order.

***(c) The amount claimed***

15. As appears from the respondents' supplementary heads of argument, the respondents argue that the applicant's original indebtedness was affected by the business rescue proceedings and that same should first be deducted before the applicant can claim any monies against the respondent.

16. They argue that it would be advisable to await the business rescue proceedings to be finalised so as to obtain a correct certificate of balance which would give the latest shortfall of the original indebtedness.
17. The applicant has tendered to deduct the amount that it will be paid in terms of the business rescue plan in an amount of R 371 786, 80 from the amount sought against the respondents, being an amount of R 2 597 405, 98.
18. The respondents concede that the applicant has agreed to payment of R 371 786, 80 from Deline and is currently receiving monthly payments in this regard since February 2021.
19. I see no reason why the applicant should await the finalisation of the business rescue proceedings.

***(d) Costs***

20. In terms of the settlement agreement, the respondents agreed that the defaulting party shall be liable for costs calculated on an attorney and own client scale.

**Conclusion**

21. In the result, it is ordered that the first, second, third, fourth, fifth and sixth respondents are ordered to pay the applicant jointly and severally, the one paying the other to be absolved,

21.1. the amount of R 2 225 619,18 inclusive of the interest rate of 14% calculated until 31 August 2020;

21.2. interest on the aforesaid amount of R2 225 619,18 at a rate of 14% per annum from 1 September 2020 to date of payment (both dates inclusive);

21.3. costs on an attorney and own client scale.

Appearances:

For the applicant: Adv L Franck

For the respondents: Adv N Mkhari

Date of the hearing: 27 October 2021

Date of the judgment: 20 December 2021