REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 19832/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 16 May 2022 E van der Schyff

In the matter between:

RODNEY GLYN NORMAN APPLICANT

and

CASH FLOW CAPITAL (PTY) LTD RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] This is an application for leave to appeal against the judgment and order handed down on 8 March 2022 wherein the applicant's application for rescission of the default judgment granted on 6 May 2021 was dismissed with costs.

[2] The applicant raised a plethora of grounds of appeal. Since I handed down a judgment that contains the reasons underpinning the order that I granted, and because the grounds of appeal are to a great extend a repetition of the submissions made when the application for rescission was heard, I do not intend to deal with each of these grounds individually.

[3] In considering this application for leave to appeal, and in objectively determining whether the applicant made out a case that an appeal would have a reasonable prospect of success as required in terms of s 17(1)(a) of the Superior Courts Act 10 of 2013, I again came to the realisation that the applicant fails to consider and to appreciate the basic difference between himself, as a natural person, and the company subjected to the business rescue proceedings, as a juristic person.

[4] A juristic person has a separate legal personality from the person(s) that created it. Chapter 6 of the Companies Act, 71 of 2008 ("the Companies Act") deal with business rescue proceedings. Section 128(1)(b) defines "business rescue' as

> 'proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –
>
> (i) The temporary supervision of *the company*, and of the management of its affairs, business and property;
>
> (ii) A temporary moratorium on the rights of *claimants against the company*, or in respect of property in its possession; and
>
> (iii) The development and implementation, if approved of a plan to *rescue the company* by restructuring *its* affairs, business, property debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis, or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders that would result from the immediate liquidation of the company.'

[5] The purpose of business rescue proceedings is to rescue the business.[1] The acceptance of a business rescue plan cannot, in itself, as of right, absolve the applicant from personal liability incurred under the guarantee provided by the applicant to the respondent. I dealt with the nature of a guarantee in the judgment and do not intend to repeat it.

[6] An argument raised by the applicant during the application for leave to appeal is that s 152(4) of the Companies Act 71 of 2008 ("The Companies Act") provides that a business rescue plan that has been adopted is binding on the company, on each of the creditors and every holder of the company's securities. Therefore, the argument goes, an adopted business rescue plan is analogous to a contract concluded between the company in business rescue and its creditors. The consensus of all the contracting parties is required for an amendment of the terms of the agreement.

[7] This argument loses sight of the fact that as far as the guarantee is concerned, the respondent is not a creditor of the company in business rescue, but of the applicant in his personal capacity. Section 152(4) 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 the adoption of the plan; or
(c) in the case of creditors, had proven their claims against the company.'

[8] It would be wrong, however, to assume that the reference to 'every holder of the company's securities' is a reference to holders of suretyships and guarantees albeit linked to the company's obligations in terms of loan agreements. The term 'securities' is defined in s 1 of the Companies Act. When the term is used in any provision of the Companies Act, the meaning ascribed to the term in s 1 will inform

[1] *Knoop NO and Another v Vorster NO and Others* (46837/2018) [2019] ZAGPJHC 196 (20 June 2019) para [14].

the meaning attributed to the term in the specific section. 'Securities' is defined to mean:

> 'any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company'.

In light of the definition contained in the Companies Act, it is clear that the guarantee in question, does not fall in the definition of securities, and the holder of the guarantee, the respondent, being neither a creditor of the company nor a holder of the company's securities, is not bound by the business rescue plan in circumstances where the respondent voted against the plan.

[9] When a natural person experiences financial hardship to the extent that it is unable to pay its debts, debt review, voluntary surrender and sequestration are possible legal mechanisms that may be utilised by either the natural person or its creditors. Each of these processes have their own inherent requirements. A natural person can, however, not hide behind business rescue proceedings to escape personal liability, unless all parties involved expressly comes to such an agreement. To hold otherwise, would be to negate the legal status of a company as a juristic person with a 'distinct legal *persona*, quite a separate entity from its members either individually or as a body'.[2] In *Dadoo Ltd v Krugersdorp Municipal Council*[3] Innes CJ held:

> 'This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; ….'

The principle applies even if the company has only one member.[4]

[10] Counsel for the applicant submits that the issues brought to the fore in this application are novel issues because no judgment could be found that deals with the questions the court was confronted with. These questions can, however, in my view be answered if the trite principles applying to the nature of a guarantee, the

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[2] Delport, P *et* al. Henochsberg on the Companies Act 71 of 2008, Nov 2021- SI 27 mylexisnexis.co.za/Index.aspx.Notes s 19.s

[3] 1920 AD 530 at 550-551.

[4] *CIR v Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) at 606.

distinction between a natural person and a juristic person, and the nature and extent of business rescue proceedings are applied.

[11] The respondent clearly expressed during the creditor's meeting of 14 April 2020 that it has a guarantee in place and that the company's director's obligations are not affected by business rescue, and that it is not competent for a process of approval of a business rescue plan to seek to compromise its claim against the director. This is why the respondent voted against the plan.

[12] I am of the view that the appeal would not have a reasonable prospect of success. No other compelling reason exists that necessitates the appeal to be heard.

[13] As for costs, although the respondent is entitled to its costs, the application for leave to appeal, other than the application for rescission, did not require the services of two counsel.

ORDER

In the result, the following order is granted:

1. The application for leave to appeal is dismissed with costs.

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E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Adv. C Zietsman
Instructed by:	Du Plessis Phukubye Smith Attorneys
For the respondent:	Adv. Y Coertzen
With:	Adv. G L Kasselman
Instructed by:	MacIntosh Cross & Farquharson
Date of the hearing:	9 May 2022
Date of judgment:	16 May 2022