

Supreme Court of Appeal of South Africa

MEDIA SUMMARY– JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

***New Port Finance Company (Pty) Ltd v Nedbank Ltd***

The SCA today delivered judgment in one of the first cases involving the new provisions of the Companies Act 71 of 2008 dealing with business rescue. The case arose from the failure of two property development schemes, one at Wedgewood near Port Elizabeth and one at Danger Point. The two appellants, New Port and Mr Mostert, its sole director, had bound themselves as sureties for the repayment of the loans from Nedbank taken to finance the developments. When the schemes collapsed the bank took judgment against the property development companies and the sureties. Thereafter the companies were liquidated and the bank commenced proceedings to wind up New Port and sequester Mr Mostert.

After these proceedings had commenced both property development companies were taken out of liquidation, placed under supervision and business rescue plans were adopted in respect of each of them. Based on that New Port and Mr Mostert brought applications in the Western Cape High Court to interdict Nedbank from executing on the judgments it had obtained against them, and in particular from pursuing the liquidation and sequestration applications, pending the outcome of the

business rescue plans. The applications were dismissed but leave to appeal was given.

By the time the appeal was heard the one business rescue plan had failed and there were accordingly no longer any grounds for the interdict that had been sought. However, the court nevertheless dealt with the merits and held that the appeal would in any event have failed. In the first instance judgment had been granted against the sureties prior to the commencement of business rescue and those judgments had finally determined the scope and extent of the liability of the sureties in regard to these debts. That liability would not be affected by the subsequent business rescue of the property development companies.

Secondly, the terms of the deeds of suretyship provided that the liability of the sureties would be unaffected by the bank affording the property development companies time or even compromising the extent of their liability. Thirdly, while not expressing a final view, the court expressed reservations as to the correctness of a high court decision in which it had been suggested that the effect of a debtor being wholly or partially discharged from liability for a debt under a business rescue plan was to release the surety from liability. The court drew attention to s 154 of the Act and said that it was capable of an interpretation that it merely operated to preclude the creditor from recovering the full amount of the debt from the debtor, leaving the liability of the surety unaffected.