THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1138/2019

In the matter between:

ZUNGU-ELGIN ENGINEERING (PTY) LTD	**APPELLANT**
and	
JEANY INDUSTRIAL HOLDINGS (PTY) LTD	**FIRST RESPONDENT**
IAN LAVERNE DONJEANY	**SECOND RESPONDENT**
LEE SPENCER DONJEANY	**THIRD RESPONDENT**

Neutral citation: *Zungu-Elgin Engineering (Pty) Ltd v Jeany Industrial Holdings (Pty) Ltd and Others* (1138/2019) [2020] ZASCA 160 (3 December 2020)

Coram: PONNAN, VAN DER MERWE and NICHOLLS JJA and LEDWABA and POYO-DLWATI AJJA

Heard: 17 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 3 December 2020.

Summary: Suretyship – at common law a surety's right of recourse arises upon payment to creditor – s 154(2) of the Companies Act 71 of 2008 does not alter common law position.

ORDER

On appeal from: Kwa-Zulu Natal Division of the High Court, Durban (Chetty J sitting as court of first instance): judgment reported *sub nom Jeany Industrial Holdings (Pty) Ltd and Others v Zungu-Elgin Engineering (Pty) Ltd* 2020 (2) SA 504 (KZD)

The appeal is dismissed with costs.

JUDGMENT

Van der Merwe JA (Ponnan and Nicholls JJA and Ledwaba and Poyo-Dlwati AJJA concurring)

[1] The first respondent, Jeany Industrial Holdings (Pty) Ltd, the second respondent, Mr Ian Laverne Donjeany and the third respondent, Mr Lee Spencer Donjeany, each bound themselves as sureties and co-principal debtors in respect of a debt owed by the appellant, Zungu-Elgin Engineering (Pty) Ltd, to Hollard Insurance Company Limited (Hollard). After having made payment to Hollard, the respondents exercised their right of recourse against the appellant. The narrow issue in the appeal is whether this debt was owed by the appellant immediately before the beginning of the business rescue process, within the meaning of s 154(2) of the Companies Act 71 of 2008 (the Act).

[2] The issue arose as follows: Sunrise Energy (Pty) Ltd (Sunrise) and the appellant entered into a contract in terms of which the latter would manufacture tanks for the storage of liquid petroleum gas. The contract provided that a performance guarantee (guarantee) had to be furnished to Sunrise. The appellant entered into an agreement with Hollard pursuant to which the latter was to provide the guarantee. On 7 October 2013 Hollard furnished the guarantee to Sunrise. It was a guarantee of the kind described in *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* [2009] ZASCA 71; 2010 (2) SA

86 (SCA) para 20. It essentially provided that 'without regard to any claim or dispute of any nature which any party may allege', Hollard would pay an amount not exceeding R33 951 466 to Sunrise on its 'first written demand', accompanied by a certificate that the appellant was in breach of its obligations under the contract with Sunrise.

[3] The agreement between the appellant and Hollard provided that the appellant would indemnify Hollard in respect of any payment that it made in terms of the guarantee. On 20 September 2013, the first respondent and three other companies signed a document entitled 'RECIPROCAL INDEMNTIY AND SURETYSHIP' (the indemnity). In terms thereof they jointly and severally bound themselves as sureties and co-principal debtors for the obligations of the appellant to Hollard. In terms of a Deed of Suretyship (the suretyship) entered into on the same date, the second and third respondents also bound themselves jointly and severally with the appellant as sureties and co-principal debtors for the latter's liabilities to Hollard. At the time the second and third appellants were directors of the appellant.

[4] On 20 February 2015, Sunrise duly demanded payment in terms of the guarantee. As a result, from 17 to 31 March 2015, Hollard paid the total amount of R33 951 466 to Sunrise. Prior to these payments, on 5 March 2015, Hollard made written demand on the respondents for reimbursement of this amount under the indemnity and suretyship.

[5] On 11 March 2015, the appellant was placed under business rescue at the behest of a creditor, the Industrial Development Corporation of South Africa Ltd. The respondents did not lodge claims related to the indemnity and suretyship with the business rescue practitioner. The business rescue plan in respect of the appellant was approved on 17 July 2015 and was subsequently implemented. It obviously did not deal with the respondents' claim in question.

[6] Hollard instituted proceedings in the Gauteng High Court, Johannesburg against the respondents, as well as the three other signatories to the indemnity, for payment of the aforesaid amount under the indemnity and suretyship respectively. On 24 June 2016 that

court gave judgment in favour of Hollard against these parties, jointly and severally, for payment of the amount of R33 951 466, as well as interest and attorney and client costs.

[7] On 7 December 2016, the respondents entered into a settlement agreement with Hollard. During the period from 5 October 2017 to 10 April 2018, the respondents, in discharge of the appellant's indebtedness to Hollard, paid the total amount of R250 000 in instalments to the latter.

[8] Following hereon, the respondents sued the appellant in the KwaZulu-Natal High Court, Durban, for payment of the amount of R250 000, based on the surety's right of recourse against the principal debtor. The appellant defended the action and the respondents applied for summary judgment. The opposed application for summary judgment came before Chetty J. He concluded that the appellant had failed to disclose a defence in law and granted summary judgment, but gave leave to the appellant to appeal to this court.

[9] Section 154(2) of the Act provides:

'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.'

[10] The appellant's sole argument proceeded along the following lines. The debt owed by the appellant to the respondents under the surety's right of recourse arose on 20 February 2015, when Sunrise demanded payment from Hollard in terms of the guarantee. Therefore, so the argument went, the debt became owing prior to the commencement of the business rescue proceedings on 11 March 2015. As the approved and implemented business rescue plan did not provide for this debt, the respondents were not entitled to enforce it in the court a quo.

[11] It is difficult to understand why the appellant chose 20 February 2015 as the date on which the debt in question became owing. As I have said, Hollard only made payment to Sunrise during the period 17 to 31 March 2015. It is true that Hollard had demanded payment

from the respondents on 5 March 2015. Even if it is accepted that their liability towards Hollard arose on that date, it matters not. The question is when did the appellant become liable to the respondents under the surety's right of recourse.

[12] The surety's right of recourse is succinctly summarised in C F Forsyth and J T Pretorius *Caney's The Law of Suretyship* 6 ed (2010) at 159:

'The surety who has paid the debt of the principal debtor to the creditor has a right of recourse against the debtor; he is entitled to reimbursement by the principal debtor of what he has paid the creditor. This was so in Roman law, notwithstanding that payment of the debt extinguished it and released the debtor; it became the Roman-Dutch law and is our law.'

[13] In *Proksch v Die Meester en Andere* 1969 (4) SA 567 (A) this court considered the common law principles in respect of when the surety's right of recourse arises. With extensive reference to Roman and Roman-Dutch authorities, Rumpff JA said at 584H-585A:

'It appears clear that at common law, a surety could only be regarded as a creditor of the principal debtor, when he had paid the creditor.' (Translated)[1]

See also *Proksch* at 589D-E, *Caney* at 163 and P A Delport and Q Vorster *Henochsberg on the Companies Act 71 of 2008* Vol 1 at 445. The same applies to the right of recourse between co-sureties. See *Caney* at 174.[2]

[14] There is a presumption in our law that a statutory provision does not alter the common law unless it says so explicitly or by necessary implication. See *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 639E and 25 *Lawsa* 2 ed Part 1 para 340. The appellant contended that to permit claims against a company that were not provided for in the approved and implemented business rescue plan, might jeopardise the business rescue. That may be so, but is irrelevant. The question is whether s 154(2) of the Act expressly or by necessary implication varied the common law principle that a debt based on the surety's right of recourse arises upon payment to the creditor. It did nothing of the sort. On the contrary, in terms of s 154(2) the question whether any debt was owed by the

[1] 'Dit skyn duidelik te wees in die gemene reg dat 'n borg alleen dan as krediteur van die hoofskuldenaar geag kon word wanneer hy die skuldeiser betaal het.'

[2] The principle is subject to exceptions that are unnecessary to tabulate as the appellant rightly conceded that none of them are applicable to the matter. See *Caney* at 165-166.

company at the specified point in time, is to be determined in terms of existing law, including the common law.

[15] The only defence that the appellant had raised, was bad in law. It follows that the court a quo correctly granted summary judgment and that the appeal must fail.

[16] The appeal is dismissed with costs.

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C H G VAN DER MERWE

JUDGE OF APPEAL

Appearances:

For appellant:	A E Bham SC, with him A Laher
Instructed by:	Edward Nathan Sonnenbergs, Sandton
	Honey Attorneys, Bloemfontein
For respondents:	V Voormoolen SC (Heads prepared by C J Pammenter SC)
Instructed by:	Zeiler Jankey Inc., Durban North
	Webbers Attorneys, Bloemfontein