THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 20264/2014

In the matter between:

ABSA BANK LTD **APPELLANT**

and

ETIENNE JACQUES NAUDE N.O. **FIRST RESPONDENT**

LOUIS PASTEUR INVESTMENTS LIMITED **SECOND RESPONDENT**

LOUIS PASTEUR HOLDINGS LIMITED **THIRD RESPONDENT**

Neutral citation: *Absa Bank Ltd v Naude NO* (20264/2014) [2015] ZASCA 97 (1 June 2015)

Coram: Ponnan, Pillay and Willis JJA and Schoeman and Fourie AJJA

Heard: 20 May 2015

Delivered: 1 June 2015

Summary: Business rescue – application for setting aside of business rescue plan – non-joinder of creditors having direct and substantial interest – notice in terms of section 130 of the Companies Act 71 of 2008 Act insufficient – counter-application declaring certain suretyships void – rendered moot on dismissal of main application – costs of.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ismail J sitting as court of first instance).

1 The appeal is dismissed with costs including the costs of two counsel.

2 The cross-appeal succeeds to the extent that the order of the court below on the counter application is set aside.

JUDGMENT

Schoeman AJA (Ponnan, Pillay and Willis JJA and Fourie AJA concurring)

[1] The appellant in this matter, ABSA Bank Ltd (the bank), was dissatisfied when a business rescue plan was adopted which it had voted against in respect of the second respondent, Louis Pasteur Investments Ltd, (the company). The bank, as applicant, brought an application against Mr Etienne Jacques Naude NO, the business rescue practitioner (the practitioner) as first respondent and the company as second respondent, for a declaratory order that the decision taken at the meeting of creditors on 12 October 2012, approving the business rescue plan for the company, was unlawful and invalid. It further asked for an order that the practitioner be removed from office. A counter-application was brought by the company and the practitioner for a declaratory order that in terms of the old Companies Act, 61 of 1973, a cross-suretyship

executed by the company and other related companies, in favour of the bank, is void.

[2] The application was dismissed inter alia on the basis that the bank had failed to join the creditors of the company and that it was precluded by s 133 of the Companies Act 71 of 2008 from bringing such an application without the written consent of the practitioner or the leave of the court. The counter-application was dismissed as it was found that the cross-suretyship was valid and not contrary to the provisions of s 226(1) of the old Companies Act.

[3] On 19 June 2012 the board of directors of the company resolved that the company begin business rescue proceedings in terms of s 129 of the Act. The notice of the commencement of business rescue proceedings was filed with the Companies and Intellectual Property Commission on 26 June 2012. At that stage the company was indebted to the bank in an amount of approximately R8,5 million pursuant to two mortgage loans. The company and four other related companies had executed a cross-suretyship in favour of the bank. The cross-suretyship, according to the bank, increased the company's liability by an additional amount of approximately R150 million.

[4] In terms of the proposed business rescue plan circulated to creditors before the meeting in which the adoption of the business rescue plan was scheduled to take place, the bank was allocated a voting interest in respect of its full secured claim. The bank's claim in respect of the cross-suretyship was considered to be a 'contingent claim' and the voting interest allocated thereto was limited to a value of approximately R2 million. The practitioner did not consider the claim in respect of the

cross-suretyship to be a concurrent claim and it was not included as such. The bank sought to object to the voting interest allocated to it before the meeting of creditors, as its voting interest had been determined without reference to the cross-suretyship, but without success. Due to the reduction of the concurrent claim of the bank, its opposition to the acceptance of the business rescue plan did not carry the day and the business rescue plan was preliminarily approved in terms of s 152(2) of the Act on 12 October 2012, on the basis that it was supported by the holders of more than 75% of the creditors' voting interest at the meeting.

[5] The present application was launched on 15 November 2012. In the founding affidavit deposed to on behalf of the bank, on 14 November 2012, the deponent inter alia stated that it seemed that the plan could not be implemented as the bank had not received any payments. It was further stated that notice of the application would be given to all affected parties 'as required in terms of section 130(3) (a) and (b) of the Act'.

[6] In the meanwhile the business rescue plan was implemented and the first payments to creditors, in terms of the business rescue plan, were made between 12 and 16 November 2012. A further two and a half years has passed since the implementation of the plan and those payments. It may be inferred that the creditors of the company have probably been receiving payments in terms of the business rescue plan for the past 30 months, by reason of the fact that, during the business rescue proceedings, if the practitioner concludes that there is no reasonable prospect that the company may be rescued, it is his or her duty to inform the court, company and affected persons of such a conclusion and thereafter apply to the court for an order discontinuing the business

rescue proceedings and placing the company into liquidation (s141(2)9a)).

[7] The practitioner deposed to an answering affidavit and raised the issue of the non-joinder of the creditors of the company. The reasons for insisting on joinder of the creditors were that the setting aside of the business rescue plan would undo their vote in favour of such plan and it would require each creditor to return all monies that were paid to it pursuant to such plan.

[8] In the court below the bank averred that the notice given to creditors in terms of s 130 of the Act was sufficient. However, notice in accordance with the provisions of s 130(3) is confined to matters where an application is brought prior to the adoption of a business rescue plan.

[9] The argument by the bank that the issue of non-joinder did not arise because the creditors had knowledge of the proceedings, due to the notices dispatched to them, and did not intervene, is without substance. It was stated in *Amalgamated Engineering Union v Minister of Labour*[1] that an interested party's non-intervention without more, 'after receipt of a notice of legal proceedings short of a citation, cannot therefore…be treated as if it were a representation, express or tacit, that the party concerned will submit to and be bound by, any judgment that may be given.' Further, it is the duty of the sheriff, when serving process, to explain the nature and exigency thereof to the person on whom service is effected.[2] The creditors could thus have made an informed decision as to whether to oppose the application.

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[1] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 662-663.
[2] Uniform Rule 4(1)(d).

[10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, Kwazulu-Natal*[3] it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. That is the position here. If the creditors are not joined their position would be prejudicially affected: A business rescue plan that they had voted for would be set aside; money that they had anticipated they would receive for the following ten years to extinguish debts owing to them, would not be paid; the money that they had received, for a period of thirty months, would have to be repaid; and according to the adopted business rescue plan the benefit that concurrent creditors would have received namely a proposed dividend of 100 per cent of the debts owing to them, might be slashed to a 5,5 per cent dividend if the company is liquidated.

[11] I therefore conclude that the court below was correct in upholding the non-joinder point. It was submitted in argument that if we were to reach that conclusion, the proceedings should be stayed and the bank should be afforded an opportunity to join the creditors. Here though a simple declaratory order was sought with no consequential relief such as the repayment by the creditors of the amounts received in terms of the plan. The undesirability of a declaratory order in a vacuum has recently been stressed by this court in *City of Johannesburg v South African Local Authorities Pension Fund.*[4] It was conceded that in any event the relief would have to be amended to provide inter alia for the repayment by

[3] *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522; [2008] ZASCA 99 (SCA) para 9.
[4] *City of Johannesburg v South African Local Authorities Pension Fund others* [2015] ZASCA 4 para 8.

creditors. There thus seems to be little point in keeping this application alive and remitting the matter to the high court. This disposes of the appeal and in the result it must fail.

[12] The bank submitted that it would be appropriate, even if the issue of non-joinder is dispositive of the appeal, that this court should nonetheless consider whether the consent of the practitioner or leave of the court should be sought before an application of this kind is brought after a business rescue plan has been adopted. This argument was premised on the basis that there are conflicting judgments of the high court dealing with this issue. However, any decision on s 133 in the context of this judgment, would be *obiter dictum*.[5] Furthermore, the matter was not fully ventilated in this court and the decision would not have any practical effect or result as envisaged by s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013. Therefore I do not consider it advisable to deal with this issue.

[13] In the counter-application the bank and practitioner sought an order that the cross-suretyship is void by virtue of the prohibition in s 226(1) of the old Companies Act. Section 226(1) provides that no company shall provide security to any person in connection with an obligation of another company controlled by one or more directors of the first company, or another company which is a subsidiary of its (the first company's) holding company. The bank's defence to this was that the cross-suretyship was valid due to the exception created in s 226(1B).

[14] It is clear that this issue was only relevant, in the instant matter, to determine whether the practitioner was correct in refusing to allow the

[5] See *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317.

bank's claim in respect of the cross-suretyship. If this were decided in favour of the practitioner and the company it would have disposed of the merits of the bank's application. Therefore, both parties in this court accepted that although it was raised as a counter-application, in truth, it was a defence to the main application. And, to the extent that it was raised as a counter application it was really conditional upon the bank succeeding in its application before the high court. As the bank failed in its application this decision had become academic and the high court should not have dealt therewith.[6]

[15] I should add that an appeal was also noted against the refusal of the application to have the business rescue practitioner removed. On appeal the bank advanced no argument in respect of this issue. Furthermore, no case was made out for this relief in the application and the bank correctly did not persist with the appeal.

[16] Therefore there is no reason why the costs of the main appeal should not follow the event. However the cross-appeal poses more of a problem. In view of the finding above that the court a quo should not have determined the issue raised in the counter-application, it would be just and equitable that no order as to costs be made in respect of the counter-application and cross-appeal.

[17] Therefore the following order is made.

1 The appeal is dismissed with costs including the costs of two counsel.

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[6] Section 154(2).

2 The cross-appeal succeeds to the extent that the order of the court below on the counter application is set aside.

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I Schoeman

Acting Judge of Appeal

APPEARANCES

For Appellant:	G W Amm
	Instructed by:
	Lowndes Dlamini, Sandton
	Matsepes, Bloemfontein
For Respondent:	J Suttner SC (with him P Cirone)
	Instructed by:
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