



Follow us on Twitter
@TheMercurySA

Take note of provisions for debt recovery during business rescue

WHEN providing finance or granting credit facilities, most creditors insist on suretyships as peace of mind that their debt is secure.

This may not be the case in the event of the debtor company being placed in business rescue.

In broad terms a surety can be described as a party binding itself in favour of a creditor as a co-principal debtor for the debts of another. Generally a default by the principal debtor triggers the right to pursue the surety.

Creditors must be mindful of the business rescue provisions of the Companies Act 2008. In introducing these provisions, the lawmakers failed to deal with the position of sureties and as such, the common law is applied once a distressed company has been released from its liabilities pursuant to a duly adopted business rescue plan.



Thys
Scheepers

Callyn
Wilkinson

LAW MATTERS
SPONSORED COLUMN

A recent judgment was handed down in the Western Cape Division of the High Court regarding the status of suretyships on the adoption of a business rescue plan.

TUNING FORK JUDGMENT:

In Tuning Fork (Pty) Limited t/a

Balanced Audio versus Jacobus Marthinus Jonker Greeff and Delano Shanon Kasner, the court decided on the defence raised by sureties where they had stood surety for a company that was placed in business rescue.

A business rescue plan had been adopted and implemented whereby all concurrent creditors would receive a dividend in full and final settlement of their claims. The dividend was only a fraction of their actual claim.

After payment of the dividends, the plaintiff in the Tuning Fork case pursued the surety of the debtor company for payment. This was despite the provision in the Companies Act that a creditor is not entitled to enforce any debt owed by the debtor company immediately before the beginning of the business rescue process, except to

the extent provided for in the business rescue plan.

If the release of the company did not affect creditors' claims against sureties, then a surety sued by a creditor would still have his ordinary right of recourse against the company. This would be with the obvious commercial disadvantage that the company might then face claims from sureties for the very claims that the company has compromised as against the creditors. This would hinder the recovery of the company and the attainment of the objectives of business rescue.

There is authority for the view that the creditor and company can agree, as a term of the plan, that the creditor's right against the surety be preserved and that the company acknowledges it will be liable for the surety under the latter's right of recourse if the creditor sues the surety

Creditors and sureties should be mindful of the business rescue provisions and the Tuning Fork judgment.

They should also be vigilant by participating in the business rescue process to ensure that the business rescue plan deals adequately with their rights.

● Callyn Wilkinson and Thys Scheepers are Partners at Cox Yeats Attorneys, specialising in insolvency, business rescue and debt recovery law.

They may be contacted at 031 536 8500 or by e-mail at cwilkinson@coxyeats.co.za; tscheepers@coxyeats.co.za

COX | YEATS
attorneys