SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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

From: The Registrar, Supreme Court of Appeal

Date: 3 December 2020

Status: Immediate

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

Today the Supreme Court of Appeal (SCA) dismissed the appeal by the appellant with costs.

The first respondent is Jeany Industrial Holdings (Pty) Ltd, the second respondent is Mr Ian Laverne Donjeany and the third respondent is Mr Lee Spencer Donjeany. The respondents 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 was 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).

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 amount under the indemnity and suretyship respectively. The court gave judgment in favour of Hollard against these parties. The respondents paid Hollard the total amount of R250 000 in instalments. Following hereon, the respondents sued the appellant in the Durban High Court 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 court granted the summary judgment with leave to this court.

The appellant's sole argument was that the debt became owing prior to the commencement of the business rescue proceedings. 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*. The question was 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. The SCA held that it did nothing of the sort. On the contrary, in terms of s 154(2) the question whether any debt was owed by the company at the specified point in time, was to be determined in terms of existing law, including the common law. The SCA held that the only defence that the appellant had raised, was bad in law. It followed that the *court a quo* correctly granted summary judgment and that the appeal must fail. The appeal was dismissed with costs.