

# Corporate Debt, Turnaround & Restructuring

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## Implications for creditors in light of *Van Zyl v Auto Commodities (Pty) Ltd* revisited: Understanding sections 154(1) and 154(2) of the South African Companies Act 71 of 2008

The South African Companies Act 71 of 2008 (Companies Act) provides a framework for business rescue proceedings, aimed at rehabilitating financially distressed companies. Sections 154(1) and 154(2) of the Act are particularly significant as they address the consequences of a business rescue plan for creditors' claims. The case of *Van Zyl v Auto Commodities (Pty) Ltd* [2021] (ZASCA 67) offers valuable insights into the interpretation and application of these provisions, especially concerning the liability of sureties.

### Section 154(1) of the Companies Act

Section 154(1) states that if a business rescue provides that the debts or part thereof that are owed to the company's creditors will be discharged once the plan has been implemented, then those creditors who have acceded to the discharge of the whole or part of a debt owing to them will lose their right to enforce the relevant debt or part of it.

This section, unlike section 154(2), does not distinguish between pre- and post-commencement debts.

### Section 154(2) of the Companies Act

Section 154(2) provides that, if a business rescue plan has been approved and implemented, 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.

This section focuses on pre-commencement debts only. Therefore, whether or not creditors have "acceded" to the business rescue plan, upon the implementation of an approved business rescue plan all creditors' rights to enforce pre-commencement debts outside the terms of the plan are limited.

### Case analysis

In *Van Zyl*, the Supreme Court of Appeal (SCA) addressed the implications of these sections on the liability of a surety. Van Zyl, the appellant, had bound himself as surety to Auto Commodities (Pty) Ltd (Auto Commodities) for the debts of Blue Chip Mining and Drilling (Pty) Ltd (BCM). BCM entered business rescue, and a business rescue plan was adopted and implemented, resulting in partial payment to creditors.

Despite the business rescue proceedings, Auto Commodities sought to enforce the remaining debt against Van Zyl under the suretyship. Van Zyl argued that section 154(2) of the Companies Act discharged his liability as surety, as the principal debt had been compromised by the business rescue plan.



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### **Court's findings: Implications for sureties**

Section 152(4) states that a business rescue plan, once adopted and implemented, binds the company, its creditors and holders of its securities, whether or not they had voted in favour of the plan. This provision ensures that all stakeholders are bound by the terms of the business rescue plan, promoting certainty and finality in the business rescue process.

However, once implemented, section 154 of the Companies Act becomes significant. The SCA found that the most obvious way for a creditor to "accede" to the discharge of a part or all of the company's indebtedness would be by voting in favour of a business rescue plan providing for discharge. That is, having regard to section 154(1), upon the adoption of a business rescue plan and as a result of a creditor voting for the plan, the debt owed to that creditor may (depending on the terms and conditions of the plan) no longer exist.

In contrast, the SCA held that while section 154(1) speaks of the discharge of the debt, section 154(2) merely places a limit on the ambit of the enforcement of the debt. That is, in the case of the former the debt clearly no longer exists, but under the latter section the pre-commencement debt exists, but is enforceable only to a limited extent.

The SCA clarified, with reference to section 3(1) of the Prescription Act 18 of 1943, that an inability to enforce a debt is not necessarily an indication that the debt has been discharged.

As such, the SCA held that the distinction which the language of the section supports is a distinction between the discharge of a debt (section 154(1)) and merely a personal protection in favour of the company against enforcement of a debt (section 154(2)). As such, if a creditor has not "acceded" to the discharge of the debt, then that creditor could enforce the debt against third parties, such as sureties.

To clarify, it is worth pointing out one further difference, a debt owed by the debtor company to a creditor may have a pre-commencement component and a post-commencement component. In terms of section 154(1), the whole debt can be discharged, but in terms of section 154(2) only the pre-commencement component may become unenforceable against the company in business rescue



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### Other implications

The *Van Zyl* case has several significant implications:

- **Voting on a plan:** A creditor must think twice before voting for, and thereby acceding to, a business rescue plan. If the plan provides for a discharge of both pre- and post-commencement debts then that creditor may want to think carefully before voting for a business rescue plan.
- **Enforceability of suretyships:** Creditors can rely on well-drafted suretyship agreements to preserve their rights against sureties, even if the principal debtor undergoes business rescue. This provides a layer of security for creditors, ensuring that they can still recover outstanding debts from sureties.
- **Drafting business rescue plans:** When drafting business rescue plans, it is crucial to explicitly address the status of sureties' liabilities. If the intention is to discharge a debt, and therefore the liability of the sureties too, this must be clearly stated in the plan to avoid ambiguity and potential litigation.
- **Legal certainty:** The decision reinforces the importance of clear and precise contractual terms. Creditors must ensure that their agreements with sureties explicitly outline the conditions under which sureties' liabilities are maintained or discharged.

### Conclusion

Sections 154(1) and 154(2) of the Companies Act play a pivotal role in the business rescue process. For creditors, this case highlights the importance of meticulous drafting in both suretyship agreements and, especially, business rescue plans to safeguard their rights and ensure enforceability. However, this case's true significance is that it underscores the importance of voting (or not) on business rescue plans.

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