REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 24110/2014

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.✓

10/11/2014
DATE

SIGNATURE

In the matter between:

GRINAKER-LTA RAIL LINK JOINT VENTURE Applicant

and

ABSA INSURANCE COMPANY LIMITED First Respondent

TSHIRELETSO BUSINESS ENGINEERING (PTY) LTD Second Respondent

ONE COMMERCIAL SECURITIES (PTY) LTD Third Respondent

J U D G M E N T

FISHER AJ:

[1] In this application, the Applicant seeks an order directing the First Respondent to make payment to it of R3 864 827.84 under an "*on-demand*" construction guarantee. The Applicant is a joint-venture entity formed for the purposes of conducting certain construction works. The Second Respondent is a sub-contractor with whom the Applicant contracted to perform services in connection with the construction works. The furnishing of the guarantee was required in terms of the contract between the Second Respondent and the Applicant to secure the performance of the Second Respondent.

[2] The guarantee was procured by the Second Respondent on 20 December 2011. The following are relevant clauses of the performance guarantee:

1. It was issued by the Third Respondent on behalf of the First Respondent.

2. It was unconditional and irrevocable.

3. In it the First Respondent made the following undertaking:

> "*1. The Guarantor will*
>
> *1.1 pay without delay to GRINAKER-LTA RAIL LINK JOINT VENTURE on the first written demand and without proof of any breach of contract by the Sub Contractor other*

than the certificate specified in 1.2 below, amounts not exceeding the following amounts:

THREE MILLION EIGHT HUNDRED AND SIXTY FOUR THOUSAND EIGHT HUNDRED AND TWENTY SEVEN RAND AND EIGHTY FOUR CENTS (in words): R3 864 827.84 (in figures)("the Guaranteed Amount")

1.2 Make such payment/s to GRINAKER-LTA RAIL LINK JOINT VENTURE upon receipt by the Guarantor of a certificate signed by the Managing Director of Grinaker-LTA Earthworks Engineering certifying that the Sub Contractor, ***in the opinion of G-LTA,*** *as at the date of issue of such certificate is in breach of its contractual obligations to GRINAKER-LTA RAIL LINK JOINT VENTURE under the Contract.*

1.3 Make such payment/s to GRINAKER-LTA RAIL LINK JOINT VENTURE at an address designated by GRINAKER-LTA RAIL LINK JOINT VENTURE for this purpose." (My emphasis)

[3] On 13 June 2014 the Applicant delivered:

1. a demand for payment under the guarantee;

2. the original guarantee; and

3. a certificate signed by the managing director of Grinaker-LTA Earthworks Engineering.

[4] This certificate has created the contention in this matter. It reads as follows:

"I, the undersigned,

Richard John Endell Evans

In my capacity as Managing Director of Grinaker-LTA Earthworks Engineering, do hereby certify that as at the date of signing hereof Tshireletso Business Engineering (Pty) Limited (Tshireletso):

Registration number 2002/0074022/07

Is in breach of its contractual obligations to Grinaker-LTA Rail Link Joint Venture in terms of the Sub Contract agreement entered into between Grinaker-LTA Rail link Joint Venture and Tshireletso on or about 18 August 2011 ..."

[5] The First Respondent opposes the relief sought. It contends that the certificate does not comply with the requirements of the guarantee and that it is thus neither entitled nor obliged to make payment under the guarantee. In its answering affidavit it contends as follows in this regard:

1. that in terms of the guarantee it was required that the Managing Director of Grinaker-LTA Earthworks Engineering certify that in the opinion of the Applicant the Second Respondent was in breach of its contract;

2. that the certificate issued did not certify an opinion of the Applicant as to the breach of the Second Respondent but rather certified, as a fact, that such breach had occurred;

3. that the company registration number of the Second Respondent set out in the certificate was not correct in that it contained a typographical error (i.e. a repeated 2) which error rendered the demand fatally defective.

[6] Mr Green, on behalf of the First Respondent, did not persist with the second point relating to the registration number.

[7] In its replying affidavit, the Applicant contended that the First Respondent's assertion as to whose opinion needed to be certified was incorrect. It alleged that the abbreviated name "*G-LTA*" used in the guarantee to refer to the entity whose opinion was to be certified, was meant to be a reference to Grinaker-LTA Earthworks Engineering and not to the Applicant. It pointed in this regard to the fact that the Applicant is only ever referred to in the guarantee as "*Grinaker-LTA Rail Link Joint Venture*" and stated that, accordingly, this reference could not have been intended to be a reference to the Applicant. This is the only allegation put forward in relation to why "*G-LTA*" is a reference to Grinaker-LTA Earthworks Engineering and not any other party. Reference to the guarantee shows that "*G-LTA*" is not defined. It could conceivably be a reference to the Applicant (as was apparently assumed by the First Respondent) or Grinaker – LTA Earthworks Engineering or even a third entity.

[8] Mr Daniels, on behalf of the Applicant argued that the court should, on the aforegoing assertion in the replying affidavit, make the finding that the reference to

"*G-LTA*" in the guarantee is meant to be a reference to Grinaker LTA Earthworks Engineering. He argued that, on an interpretation of the guarantee, the reference to "*G-LTA*" could only be understood to be a reference to Grinaker-LTA Earthworks Engineering. He argued further that, once this was accepted, then the arguments in relation to the fact that "*an opinion*" was not specifically referred to was semantic in that the statement of fact by the Managing Director of Grinaker-LTA Earthworks Engineering, in his capacity as such, constituted the required expression of the opinion of Grinaker-LTA Earthworks Engineering's as to such fact.

[9] A finding that the reference to "*G-LTA*" in the guarantee is a reference to Grinaker-LTA Earthworks Engineering is thus the starting point of the argument on behalf of the Applicant. Without such a finding the case for the Applicant cannot succeed. I say this because, if "*G-LTA*" cannot be said, in this context, to be Grinaker-LTA Earthworks Engineering, then it follows that the certification by the Managing Director cannot be argued, on any basis, to be the *"opinion of G-LTA"*.

[10] Mr Green, on behalf of the First Respondent, argued that this was not a finding that this court is called upon to make in this application. I am inclined to agree with this submission - on two bases:

1. firstly, because a case was not made out that the reference to "*G-LTA*" in the guarantee was intended to be a reference to Grinaker-LTA Earthworks Engineering; and

2. secondly, because such a finding is irrelevant to the liability of the First Respondent to make payment under the guarantee in light of the requirement that a guarantee of the type in issue be strictly complied with.

[11] On the first basis - one would have expected the contention that the parties intended the abbreviation *"G-LTA"* be a reference to Grinaker-LTA Earthworks Engineering to have been made in the founding affidavit. However, the first time that the contention is made is in reply. There is no reason why the Applicant should be allowed to make this case in reply. Van Winsen J stated the general principle against making out a case in reply thus in **Riddle v Riddle**:[1]

> *"Undoubtedly, it is a general rule of our practice that all allegations necessary to establish the applicant's cause of action must appear in the petition and/or the supporting affidavits and that the petitioner cannot cure a deficient case or fortify one, inadequately set forth, by introducing new matter in his replying affidavits, and that if he attempts to do so the offending paragraphs in the latter affidavits will be struck out. See for instance* ***Coffee, Tea & Chocolate Co. Ltd. v Cape Trading Co.****, 1930 CPD 81 at p82;* ***Victor v Victor*** *1938 WLD 16;* ***Mauerberger v Mauerberger****, 1948 (3) SA 731 (C) and* ***Bayat and others v Hansa and Another*** *1955 (3) SA 547 at p553 (N)."*

[12] In any event, and even were the case made out, the matter would still fall to be determined against the Applicant on the second basis, on the reasoning that follows.

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[1] 1956(2) SA 739 at 478

[13] This Court is called upon to determine whether the First Respondent was entitled to refuse to make payment under the guarantee in light of the terms of the certificate in issue. The enquiry should not be elevated to a case about the interpretation of the guarantee. The guarantee is a written agreement. It is clear and unambiguous and capable of being complied with according to its tenor. It requires no interpretation or clarification as to what was required to achieve payment. There needed, in this context, to be no more than a reference in the certificate to the entity in question by the name used in the guarantee - i.e. *"G-LTA"*. Indeed it is not contemplated that any other name may be used.

[14] Strict compliance with the terms of the guarantee is required. Our courts have strictly applied the principle that a bank faced with a valid demand in respect of a performance guarantee is obliged to pay the beneficiary thereof without investigation of the underlying contractual position[2]. It is thus of no moment to the First Respondent who *"G-LTA"* is. This is not part of the field of its enquiry.

[15] Nugent JA, in **OK Bazaars (1999) Ltd v Standard Bank of South Africa Ltd**[3] had the following to say in relation to the obligations of an issuing bank that established a letter of credit (which is analogous to a guarantee of the type in issue herein[4]):

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[2] Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd 2013 JDR 2727 (SCA) at p15, para [28]
[3] 2002 (3) SA 688 at 697 para [25]
[4] Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd 2010 (2) SA 86 (SCA) at para [20]

"...[the issuing bank's] *interest is confined to insuring that the documents that are presented conform with its client's instructions (as reflected in the letter of credit) in which event the issuing bank is obliged to pay the beneficiary. If the presented documents do not conform with the terms of the letter of credit the issuing bank is neither obliged nor entitled to pay the beneficiary without its customer's consent. The obligation of the issuing bank was expressed as follows in* ***Midland Bank Limited v Seymour*** *[1955] 2 Lloyds Rep 147 at 151:*

> *There is, of course, no doubt that the bank has to comply strictly with the instructions that it is given by its customer. It is not for the bank to reason why. It is not for it to say: 'This, that or the other does not seem to us very much to matter'. It is not for it to say: 'What is on the bill of lading is just as good as what is in the letter of credit and means substantially the same thing'. All that is well established by authority. The bank must conform strictly to the instructions which it receives."*

[16] In a similar vein, Lord Denning MR in **Edward Owen Engineering Limited v Barclays Bank International Limited**[5] stated the following:

> *"A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice."*

[17] Similarly, in **Lombard Insurance Co Limited v Landmark Holdings (Pty) Ltd**,[6] Navsa JA held:

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[5] [1978] QB 159 (CA); [1978] 1 All ER 976 at 983B to D (all England Reports) and 171 A to B (QB)

[6] supra at para [20]

> *"The guarantee by Lombard is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of which is the establishment of a contractual obligation on the part of a bank to pay the beneficiary (seller). ... The bank's liability to the seller is to honour the credit. The bank undertakes to pay provided only that the conditions specified in the credit are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary ..."*

[18] The Applicant was thus neither entitled nor obliged to make the assumption or that "*G-LTA*" is a reference to Grinaker-LTA Earthworks Engineering nor was it obliged to enter in to an enquiry in relation to this aspect. It was necessary only that it establish, from the face of the certificate, that the entity whose opinion was being certified was the entity contemplated in the guarantee. The question is thus not whether Grinaker-LTA Earthworks Engineering is indeed the entity whose opinion is to be certified in terms of the guarantee but rather whether the certificate has been drawn on the basis that the required certification of opinion emerges therefrom. Accordingly, there is no basis for this court to enter into an enquiry relating to the intended identity of *"G-LTA"*. The Applicant is simply not entitled to secure payment against a demand that is at odds with the strict and literal requirements of the guarantee (i.e. a certification of the opinion of an entity called "*G-LTA*"). Substantial or equivalent compliance (i.e. certification of the opinion of an entity that does not emerge from the certificate as being that that specified in the guarantee) is not permissible on the cases which I have referred to above.

[19] In the circumstances, the application must fail:

[20] I thus make the following order:

1. The application is dismissed.

2. The Applicant is to pay the costs of the application, which costs are to include the costs of employing two counsel.

DC FISHER
Acting Judge of the High Court

APPEARANCES:

For the Applicant:
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For the First Respondent
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DATE OF HEARING
09 October 2014

DATE OF JUDGMENT

10 November 2014