IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
DATE:	16 November 2020
SIGNATURE: CG LAMONT	

Case Number: 2020/14298

In the matter between:

TDS PROJECTS CONSTRUCTION AND NEWRAK MINING JV (PTY.) LTD	**APPLICANT**
AND	
EXXARO COAL MPUMALANGA (PTY) LTD	**FIRST RESPONDENT**
AND	
ABSA BANK LTD	**SECOND RESPONDENT**

JUDGMENT

LAMONT, J

1) This is an application launched by the applicant wherein it seeks an order interdicting the first respondent from demanding payment under a guarantee issued by the second respondent, at the instance of the applicant, as security for the applicant's obligations under an agreement concluded between the applicant and the first respondent, and interdicting the second respondent from making payment under such guarantee.

2) The applicant does so on the basis of:

   2.1) The first respondent's demand under the guarantee being non-compliant with the express wording of the guarantee, and thus being fatally defective; and

   2.2) The absence of any underlying indebtedness, a jurisdictional prerequisite for a demand upon the guarantee, which renders the first respondent's demand upon the guarantee fraudulent.

3) The first respondent opposes the application on the basis that it's demands were competent and that such compliance deficiencies as there may have been were *de minimis.*

4) The first respondent launched a conditional counter-application seeking that the applicant issue a new guarantee in its favour and be interdicted from interdicting a demand being made upon the new guarantee.

5) The applicant submits in response to the counter-application that the dispute in the counter-application is one that is subject to arbitration and thus liable to be stayed pending the referral thereof to arbitration and that there is a dispute of fact which, ordinarily, and but for the arbitration provisions, would necessitate the matter being referred to trial. It submits that, as arbitration is the appropriate forum for the determination of such dispute, a stay is the appropriate relief.

6) The application contains an urgent application which was dealt with separately save for costs which were reserved. The parties agree that those costs be costs in the cause in the application before me.

7) The first respondent submits that the applicant is not entitled to raise the issue concerning the non-compliance of the demand for payment with the terms of the guarantee for two reasons. First it is not part of the applicant's case and second as the applicant is not a party to the contract in terms of which the guarantee was issued it has no rights in that contract.

8) The first respondent referred to the founding affidavit and submitted that the paragraph setting out the reasons why the applicant approached the court did not mention the defective demand notice. This is true. However there are numerous references to the defective demand throughout the affidavit which raise the issue squarely. The fact that the applicant may have been remiss in its formulation of one paragraph does not limit the ambit of other paragraphs and the evidence provided dealing with the issue. The affidavit is to be considered as a whole and the issues and evidence concerning the distilled from it. See *Swissborough Diamond Mines (Pty) LTD and Others v Government of the Republic of South Africa and Others*[1] where it was held

> "In Heckroodt NO v Gamiet 1959 (4) SA 244 (T) at 246A--C and Van Rensburg v Van Rensburg en Andere 1963 (1) SA 505 (A) at 509E--510B, it was held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers,

[1] 1999 (2) SA 279 (T).

provided they arise from the facts alleged. As was held in Cabinet for the Territory of South West Africa v Chikane and Another 1989 (1) SA 349 (A) at 360G, the principle is clear but its application is not without difficulty."

9) The first respondent submits that the applicant has no rights to exercise in the guarantee contract to which it is not a party. It submits that while the law permits the applicant to raise issues of fraud in the main construction contract it does not permit the applicant to raise issues concerning the performance of obligations in the contract of guarantee. This attack is directed to the applicant's challenge to the issue of compliance of the demand with the terms of the contract.

10) The law concerning the right to raise issues of fraud in the main construction contract is settled. See for example Granbuild cited with some of the other authorities below.

"[58] … If, on a proper interpretation of the guarantee, the circumstances entitling the employer to demand payment and obliging the guarantor to make it do not exist, the contractor has a clear interest in interdicting payment, because the guarantor will invariably have some right of recovery against the contractor (here the counter-indemnity). That this is an interest worthy of protection by way of an interdict has been taken for granted in a number of cases, including by the Supreme Court of Appeal in Zanbuild supra, … Reference may also be made, by analogy, to cases dealing with irrevocable documentary credits. The issuing bank is required to make payment to the beneficiary upon presentation of the documents specified in the credit unless the beneficiary's demand is fraudulent. It is recognised that the bank's customer (typically a purchaser of goods in an international sale) may interdict payment if the beneficiary makes a fraudulent demand (see Loomcraft Fabrics CC v Nedbank Ltd & Another 1996 (1) SA 812 (SCA)). Fraud is, in such cases, the ground for the interdict, not the basis of locus standi. The standing of the bank's customer in such a case must derive from its recognised financial interest in preventing payment of the credit contrary to the bank's legal obligation.

[59] Furthermore, a construction guarantee is normally furnished pursuant to the terms of a building contract. The contractor has a direct contractual right against the employer to prevent the latter from making demand under the guarantee contrary to the terms of the building contract."

See also: *Granbuild (Pty) Ltd v Minister of Transport & Public Works, Western Cape & Another* [2015] ZAWCHC 83 at paras 57-61; *KNS Construction (Pty) Ltd v Genesis on Fairmont & Another* 2009 JDR 0781 (GSJ) at paras 12-16; *Joint Venture Between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency Soc* Ltd [2019] 3 All SA 186 (GP) at paras 115-120.

11) The issue concerning the right to raise the noncompliance of the demand with the terms of the guarantee was dealt with in the State Bank of India case which allowed the issue to be raised in similar circumstances. See*State Bank of India and another v Denel Soc Limited and others*[2], it was there held that :

> "[27] I should mention that Counsel for the appellants did question the *locus standi* of Denel, to seek interdictory relief with regard to the counter guarantees, as it was not a party thereto. However, as explained above, there is a banker-client relationship between Absa and Denel in terms of which Denel mandated Absa to issue the counter guarantees to the Indian banks. In my view, this contract of mandate would be subject to an implied term that Absa would only make payment to the Indian banks in circumstances where the demands of the Indian banks comply with the terms of the relevant counter guarantees. From this it follows that Denel would be entitled to approach the court for interdictory relief if Absa were to threaten to make payment of a counter guarantee, in circumstances where the demand made upon Absa is non-compliant. In effect, Denel would be asking for specific performance of the contract of mandate, in the negative sense of non-performance of an act impliedly forbidden by the contract of mandate."

12) The first respondent submits "In *Petric Construction CC t/a AB Construction v Toasty Trading* 2009 (5) SA 550 (EC), the court held that a contractor, in the same position as the applicant and as a non-party to the guarantee, has no right and is not entitled to restrain payment of a guarantee pending resolution of a dispute relating to a contract. Petric Construction has been consistently followed and applied in our courts, see *Dormell Prop 282 CC v Renasa Ins Co Ltd NNO* 2011 (1) SA 70 (SCA)."

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[2] [2015] 2 All SA 152 (SCA).

Petric does not consider the issue raised in the present matter and in the *State Bank of India* matter. Neither do the other SCA cases referred to by the first respondent. I am bound by the authority of *State Bank of India* and follow the ratio of that authority.

13) The applicant is entitled to raise the issue of the compliance or otherwise of the demand with the terms of the performance guarantee.

14) The second respondent is obliged to "honour [the] guarantee according to its terms" See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976, the construction of the bond concerns a construction of its terms, in which regard see *IE Contractors Ltd v Lloyds Bank Plx and Rafidain Bank* [1990] 2 Lloyd's Rep 496 (CA) at 501.The process of construction was also recently fully explained in *Chisuse and Others v Director-General, Department of Home Affairs and Another.*[3]

15) The second respondent's role in dealing with the demand made under the contract has been expressed in *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd*[4] as being:

> "[The bank's] interest is confined to ensuring 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 Ltd v Seymour [1955] 2 Lloyd's 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

[3] 2020 (6) SA 14 (CC).
[4] 2002 (3) SA 688 (SCA) at para 25.

> 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) The terms of the guarantee require the demand to be in a particular form. The relevant terms are to be found in the guarantee, read with the Uniform Rules for Demand Guarantee ICC Publication No 758. ("URDG") which are explicitly imported by reference are clear, and require, *inter alia*, that the:

16.1 Demand be supported by a statement indicating in what respect the applicant was in breach of its obligations under the Contract;

16.2 Amount claimed be due and payable;

16.3 Demand be made by the first respondent; and

16.4 Signatory thereto warrant his authority to sign the demand "Written demands shall be signed by a person who warrants that he/she is duly authorised to sign."

16.5 Guarantee shall expire on 19 June 2020.

16.6 The Guarantee is subject to URDG.

17) The URDG in Rule 15 provide:

> "a. A demand under the guarantee shall be supported by such other documents as the guarantee specifies, and in any event by a statement, by the beneficiary, indicating in what respect the applicant is in breach of its obligations under the underlying relationship. This statement may be in the demand or in a separate signed document accompanying or identifying the demand.
> b. A demand under the counter guarantee shall in any event be supported by a statement, by the party to whom the counter guarantee was issued, indicating that such party has received a complaint demand under the guarantee or counter

guarantee issued by that party. This statement may be in the demand or in a separate signed document accompanying or identify the demand."

18) Two separate notices of demand were delivered to the second respondent. The first sent on 10 June 2020 reads:

"WRITTEN NOTICE TO GUARANTOR IN TERMS OF THE PERFORMANCE GUARANTEE ISSUED
BY THE ABSA BANK LIMITED ON BEHALF OF TDS PROJECTS CONSTRUCTION AND NEWRAK
MINING JV (PTV) LTD
TRANSACTION REFERENCE NUMBER: 175-02-0177727-G IN FAVOUR OF EXXARO COAL
MPUMALANGA (PTV) LTD
1. We refer to the attached Letter of Guarantee dated 22 August 2018.
2. We, hereby, call on you to now make payment to ourselves, in terms of your undertaking contained in the attached Letter of Guarantee, in the amount of R32 082 012.90 (thirty-two million and eighty-two thousand and twelve rand and ninety cent) ("the Demand amount').
3 . The Demand amount is payable to us as a result of the Contractor's failure to perform
in terms of the Contract and its deemed event of default, as per clause 32 of the agreement.
4. Payment should be effected into the following account [detail omitted]:
5. Kindly acknowledge receipt and address any further communications to the writer.
Yours faithfully
CKOORSEN
MANAGER, CAPITAL BUYING"

The second sent on 19 June 2020 reads:

"2020-06-19
ABSA CORPORATE AND INVESTMENT BANKING
A DIVISION OF ABSA BANK LIMITED

(REGISTRATION NUMBER: 1986/004794/06)
15TH FLOOR
TOWERS NORTH 1E1
180 COMMISSIONER STREET
JOHANNESBURG
2001

Dear Sirs

WRITTEN NOTICE TO GUARANTOR IN TERMS OF THE PERFORMANCE GUARANTEE ISSUED
BY THE ABSA BANK LIMITED ON BEHALF OF TDS PROJECTS CONSTRUCTION AND NEWRAK
MINING JV (PTV) LTD
TRANSACTION REFERENCE NUMBER: 17S-02-0177727-G IN FAVOUR OF EXXARO COAL
MPUMALANGA (PTV) LTD

1. We refer to our letter of demand as well as the original performance guarantee reference number 175-02-0177727-G delivered to you by hand on 10 June 2020.
2. We confirm that the original performance guarantee has been in your possession since 10 June 2020.
3. We furthermore refer to our letter of suspension of the letter of demand dated 17 June 2020:
4. We hereby advise you of the retraction of our instruction for suspension of our letter of demand and hereby call on you to now make payment to ourselves, in terms of your undertaking contained in the Letter of Guarantee, in the amount· of R22 165 055.66 (twenty two million one hundred and sixty five thousand and fifty five rand and sixty six cent) ("the Demand amount").
5. The Demand amount ls payable to us as a result of the Contractor's failure to perform in terms of the Contract and Its deemed event of default, as per clause 32 of the agreement.

Yours faithfully
CKOORSEN
MANAGER, CAPITAL BUYING”

19) Both demands contain the unsubstantiated averments that the demand amount was payable “as a result of the applicant’s failure to perform in terms of the Contract and its deemed event of default…”. The requirement that the demand be supported by a statement indicating in what respect the applicant was in breach of its obligations under the contract is not met. Instead the demand contains a conclusion of law unsubstantiated by the underlying facts.

20) There was no statement in either demand that the amounts claimed were due and payable, there are only the recordals that the amounts demanded were payable, the amount claimed in each demand differs materially from the amount claimed in the other.

21) There is no warranty of authority of the signatory. The fact that the signatory identifies himself as “manager, capital buying” does not constitute a warranty, it is merely an identification of his status as an employee.

22) The guarantor is required to scrutinise the demand and only act in accordance therewith if the terms of the contract are complied with. Hence the second respondent should refuse to pay as the two demands are non-compliant with the requirements of the guarantee.

23) After receipt of the first demand the second respondent represented by its employee indicated that the demand was not compliant and it identified what the requirements which were to be met. The second demand (19 June 2020) did not make the relevant changes. This notwithstanding, the second respondent represented by the same employee on 22 June 2020 indicated it would make payment pursuant to the second demand. The second respondent has filed an affidavit setting out that that employee was not authorised to have made the statement he did on 22 June 2020 and that it has always persisted and continued to persist in its refusal to meet the demand. As the employee lacked authority the conduct of the employee in accepting an obligation to pay was not binding on the second respondent.

24) The first respondent submitted that the Rules of URDG and in particular Rule 24(e) required the second respondent to state that it regarded the demand as non-compliant and that as it had not done so it could not now refuse to pay. The non-compliance notice was issued after the first but before the second demand was delivered. The facts in my view demonstrate that although there were two demands they constituted one act of making demand. There was a suspension of the claim for a time after the first demand was made. The intention of the second demand was to terminate the suspension and indicate that second respondent was pursuing its claim made in the first demand. The second respondent had notified the first respondent of its attitude that it would not pay after the first demand and that attitude remained until the unauthorised notification on 22 June 2020 that it would make payment. In my view there is merit in the approach of the second respondent that it had notified the first respondent that it would not pay and that it did not need to repeat the notification after the second demand was presented for payment.

25) As there was notice as required by Rule 24(e) of Rules of the URDG the second respondent is entitled to refuse to make payment.

26) It is not necessary to deal with the allegations that the claim is fraudulently made as the non-compliance with the contractual obligations relating to the demand is dispositive of the matter.

27) It remains to deal with the counter-claim. The first respondent has set out that there is an agreement that a guarantee be provided by the second respondent. The allegations are disputed and there is clearly a dispute of fact which it is not convenient to resolve on paper. In addition there is an arbitration provision geared to deal with the dispute.

28) It follows that the applicant's application must succeed and the counter-claim must fail. The costs relating to the counter-claim are insignificant. I include them as costs in the cause of the costs of the main application. The costs of the urgent application are to be costs in the main application by consent.

29) I make the following order:

1. The demands made on 9 June 2020 and 19 June 2020 by the first respondent upon the second respondent requiring payment of the guarantee issued by the second respondent under reference number 175-02-0177727-G, are declared to be invalid and of no force and/or effect;
2. The second respondent is interdicted and restrained from making payment to the first respondent of any amount demanded under the guarantee issued by the second respondent with reference number 175-02-0177727-G;
3. The counterclaim is dismissed with costs to be costs in the cause of the applicant's application;
4. The costs of the urgent application are to be costs in the cause of the applicant's application;
5. The second respondent is to pay its own costs;
6. The first respondent is to pay the costs of the applicant's application including all the costs referred to in paragraphs 3 and 4 above.

CG Lamont
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG
Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the

electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 November 2020.

HEARD ON: 02 November 2020

JUDGMENT DELIVERED ON: 16 November 2020

APPEARANCES:

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