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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

..... 18/9/2017.....

CASE NO: 37706/15

In the matter between:

ALL TECKLINE CONTRACTORS INCORPORATED

Applicant

And

MUTUAL AND FEDERAL INSURANCE COMPANY LIMITED

Respondent

MR VATHASALLUM REDDY

First Third Party

POWER NETWORK CONTRACTORS (PTY) LTD

Second Third Party

JUDGMENT

NKOSI AJ

INTRODUCTION

1. The applicant seeks a money judgment for payment of **R7 500 000, 00** cost and interest at 15.5 % per annum to be calculated from the 30 November 2012.
2. The applicant's claim is based on the so called guarantee on demand issued by the Respondent in favour of the Application.

BRIEF BACKGROUND

3. It is common cause that
 - 3.1 Edison Jehamo Power Proprietary Limited ("EJP") concluded a written agreement with City Power ,Johannesburg to perform certain work on transmission lines ('the City Power contract');
 - 3.2 EJP subcontracted some of the work entailed by the City Power Contract ("The subcontract") to Quanta International Limited ("Quanta").

- 3.3 It was a term of the subcontract that the subcontractor would advance money to EJP to enable it to perform certain work under the main City Power contract.
- 3.4 It was a further term of the subcontract that the repayment by EJP of the amount advanced to it by the subcontractor would be secured by a payment guarantee issued by a bank or an insurer. In this instance, the Respondent, an insurance company.
- 3.5 Quanta then ceded and assigned its obligation under the subcontract to the applicant who advanced a loan of **R12 500 000, 00** to EJP. The loan was secured by a payment guarantee issued by the Respondent.
4. It would seem EJP defaulted with the repayments of the loan advanced to it. On 30 November 2012 the applicant demanded payment of **R7 500 000, 00** under the guarantee from the Respondent. Payment as demanded was not made and further demands were made on 28 March 2013 and 22 July 2013. These subsequent demands did not yield the desired outcome.
5. The Respondent, the first third party and the second third party disputes the applicant's claim for various grounds which I shall deal with later.

6. The Respondent holds indemnities and suretyships and has deemed it necessary to join the third parties on the basis of their obligation to indemnify the Respondent as a safety net in case the Applicant succeeds in its claim against the Respondent .

7. The counter indemnity entered into between the Respondent and EJP reads ;

7.1 (EJP) *"Do hereby indemnify and keep indemnified the Insurance Company and hold it harmless from and against all and any claims, losses, demands, liabilities, costs and expenses of whatsoever nature, (including legal costs as between attorney and client) which it may at any time sustain or incur by reason or in consequence of having executed, or hereafter executing any guarantee/s on my /our behalf.*

And I/we further undertake and agree to pay to the Insurance Company on demand any sum or sums of money which the Insurance Company may be called upon to pay under the Guarantees (together with interest thereon as hereinafter defined), whether or not the Insurance Company at such date shall have made such payment, and whether or not we admit the validity or amount of such claim against the Insurance Company under the Guarantees. If we dispute the validity of amount of any such claim we shall nonetheless be obliged to deposit the amount thereof with the Insurance Company, on demand, pending adjudication or settlement of such dispute".

8. In addition to the counter indemnity there is a deed of suretyship entered into between the Respondent and EJP (the contractor) and the first third party which reads inter alia ;

"B. The Contractor has agreed to indemnify the Insurance Company (hereinafter referred to as "the indemnity") in terms whereof it undertook to keep the Insurance Company indemnified and to hold it harmless from and against all and any claims, losses, demands, liabilities, costs or expenses of whatsoever nature which the Insurance Company may sustain or incur by reason or in consequence of having executed or hereafter executing any Guarantees as aforesaid on behalf of the Contractor".

"C. I/We, the undersigned, (hereafter referred to as ("Surety/Sureties")) have agreed to bind myself /ourselves, as surety /sureties for and co-principal debtor/s jointly and several with the contractor to the Insurance Company on demand of any amounts which the Contractor may by liable to pay to the Insurance Company under the Indemnity".

9. The first third party on his own also signed the deed of suretyship which reads inter alia ;

"I/We, the undersigned,

VATHASALLUM REDDY

Identity Number xxxxxx xxxx xx

Unmarried

Do hereby interpose and bind myself/ourselves as surety/sureties for and co-principal debtor/s jointly severally with the contractor, in solidum for the due payment by the contractor to the Insurance Company of all and any amounts which the Contractor may be liable to pay to the Insurance Company under the indemnity, and further indemnify and keep indemnified the Insurance Company and hold it harmless from and against all and any claims ,losses , demands, liabilities, costs and expenses of whatsoever nature, including legal costs as between attorney and client which it may at any time sustain or incur by reason or in consequence of having executed or hereafter executing any Guarantee on behalf of the contractor ,(together with interest thereon at the prime overdraft rate of ABSA Bank Limited, plus 2% to date of payment by us)".

10. The third parties are disputing the liability of the Respondent to the applicant as well as their liability to the Respondent in doing so they put forward these defences

1) They allege that the suspensive condition contained in clause 4(A) 2 of the subcontract (the agreement concluding between EJP and Quanta) was not fulfilled thereby by rendering the subcontract invalid and unenforceable.

2) They further contend that the payment guarantee of **R30 000 000, 00** was never delivered and consequently the

suspensive condition of the cession and assignment agreement was not fulfilled.

3) They further contend that the amount owing by EJP is excessive and not the amount due and payable by EJP.

ISSUES TO BE DETERMINED

11. These are ;

11.1 Whether the applicant's demand for payment against the guarantee was strictly compliant with the terms of the guarantee.

11.2 Whether the third parties have disclosed any defence to the respondent's claims for indemnification.

THE LEGAL PRINCIPLE PERTAINING TO GUARANTEES

12. There seems to be no dispute amongst the parties regarding the applicable principle pertaining to guarantees. It is common cause that the guarantee in issue is a so called on-demand guarantee. It creates a self-contained and primary obligation between the guarantor and the beneficiary. It must be honoured by payment when a demand is made that complies with the formalities as

recorded in the demand .The guarantor may not refuse payment simply because it is not due¹.

13.In Lombard Insurance company Ltd v Landmark Holdings (Pty) Ltd² ,Navsa JA held that ;

"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). This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold. Whatever disputes subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned. 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. This exception falls within a narrow compass and applies where the seller, for the purpose of drawing on the credit, fraudulently presents to the bank documents that to the seller's knowledge misrepresent the material facts".

¹ Lombard insurance company Ltd v Landmark Holdings (Pty) Ltd 2010 (2) SA 86 (SCA)

² Lombard (supra) para 20 also see Coface South Africa Insurance Co Limited v East London Own Haven Housing association 2014 (2) SA 382 (SCA)

14. A demand on the guarantee must comply with the requirements of the guarantee for it to be honoured³. In the absence of a demand made fraudulently and in bad faith regardless of a dispute emanating from the underlying contract⁴ the demand must be met. Generally fraud must be pleaded clearly and distinctively. If fraud led to the conclusion of a contract, (in this instance, the making of a demand) cancellation may be claimed⁵.

THE RESPONDENT'S DEFENCE TO THE APPLICANT'S CLAIM

15. The respondent submitted that all three demands made by the applicant did not constitute a valid demand in terms of the guarantee. It argued that the terms of the guarantee which reads ;“...on written demand from Allteck ...” was not complied with. The demand was, however, in writing and on Allteck's letterhead. The letterhead speaks for itself; it confirms that the demand was made by the applicant. The Respondent's further argument that the Applicant demand ought to have indicated that the amount “is payable to Allteck in circumstances contemplated in the subcontract”,

³ Denel SOC Ltd v ABSA Bank Ltd and Others [2013] 3 All SA 81 (GSJ) at [6]

⁴ Coface (supra)

⁵ W v W (2666/20160 [2016] ZACGHC 73 at para 22 and 23 see also North West Provincial Government v Tswaing Consulting CC [2007] 2 ALL SA 365 (SCA).

cannot be sustained. It is clear from the applicant's first letter of demand that it, without a doubt, sought payment in terms of the guarantee.

16. The Respondent has not raised an issue about the applicant's letterhead for instance, the name of the company, the company registration number, the address of the company appearing on the letterhead and the content of the letter of demand except that the said letter does not states that the amount "is payable to Allteck in the circumstances contemplated in the subcontract". The circumstances contemplated in the subcontract are clearly spelled out in the Applicant's letter of demand. The payment to "us" clearly refers to Allteck and no one else. There is no extrinsic evidence required to establish who "us" is .In my view the demand for payment complies substantially and materially with the requirements of the guarantee. I therefore find that the refusal to pay has no basis and that the Respondent is liable to pay the applicant.

THE THIRD PARTIES DEFENCE TO THE RESPONDENT'S CLAIM

17. The applicant has raised an objection to the second third party's answering affidavit on the basis that it is out of time and that there is no condonation sought .In exercising my discretion

,I have deemed it necessary to condone the late filing of the second third party's answering affidavit.

18.The third parties contend that the applicant's demand is not compliant with the guarantee. It further contends that there was fraud on the part of the applicant in making demand pursuant to the guarantee. I have already made a finding with regard to the first contention of the third parties. I will therefore continue to deal with the second contention of the third parties which relates to the issue of fraud. If I were to conclude that fraud was indeed committed on the part of the Applicant, the effect thereof would mean that the Respondent is not liable to the applicant and accordingly the third parties not liable to the Respondent.

19.The second third party asserts that the South African Reserve Bank did not give the consent required in terms of the condition precedent contained in clause 4A.2 of the subcontract and that there was no waiver by Quanta of the condition precedent in terms of clause 4A.3 of the subcontract. It submits that the subcontract was therefore not valid and enforceable. The first third party makes similar assertions. They both argue that the applicant was fully aware of these assertions yet proceeded to make a demand for

payment. The defences raised by the third parties are not relevant to the Respondent's claim against them.

20. The defence of fraud, if any, does not relate to the guarantee, indemnity or suretyships. It questions the validity of the subcontract. The legal principle is clear as indicated in the case of Lombard which I have already referred to, that⁶ ;

"This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold. Whatever disputes subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned".

21. In this case as well the obligation to pay is wholly independent of the underlying contract. In the circumstances I am inclined to reject the defence of the third parties. I consequently find that the third parties have raised no valid defence to the Respondent's claim of indemnity.

ORDER

22. I make the following order ;

- 1) The respondent shall pay the applicant the amount of **R 7 500 000, 00.**

⁶ Lombard (supra)

- 2) The Respondent shall pay interest on the said amount at the rate of 15.5% calculated from 30 November 2012 to date of payment.
- 3) The first and second third parties shall indemnify the Respondent for payments made by the respondent to the applicant pursuant to this order and in terms of the suretyship and counter indemnity entered into between the Respondent and the first and second third parties, respectively.
- 4) The Respondent and the third parties shall pay the applicant's costs of this application which shall include the costs of two counsels

NKOSI, AJ

For Applicant	: Adv. AM Smalberger SC Adv. KD Iles
Instructed by	: Werksmans Incorporated
For Respondents	: Adv. J Daniels
Instructed by	: Frese, Moll & Partners

For First third Party : Adv. L Hollander
Instructed by : Afzal Lahree Attorneys

For Second Third Party : Adv. L Hollander
Instructed by : Shannon Little Attorneys

Date of Hearing : 04 September 2017

Date of Judgment : 18 September 2017