

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- | | |
|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: ✓ |

Date: **14th August 2023** Signature: _____

A handwritten signature in blue ink, appearing to be "H. J. van der Merwe", is written over the signature line.

CASE NO: 20420/2020

DATE: 14TH AUGUST 2023

In the matter between:

**INDUSTRIAL DEVELOPMENT CORPORATION
OF SOUTH AFRICA LIMITED**

Applicant

And

VAN DER MERWE, BERTUS

First Respondent

NAUDE, MICHAEL ANDREW

Second Respondent

SONNEKUS, KENNETH DANIEL

Third Respondent

STEVAL ENGINEERING (PTY) LIMITED

Fourth Respondent

Neutral Citation: *Industrial Development Corporation of SA v Van der Merwe and 3 Others (20420/2020) [2023] ZAGPJHC --- (14 August 2023)*

Coram: Adams J

Heard on: 02 August 2023

Delivered: 14 August 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being

uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 14 August 2023.

Summary: Contract – specific contracts – demand guarantee and performance guarantee – compliance – guarantee in question – consisting, as it did, of an undertaking to make payment of amounts of money in the event of default by the main debtor – autonomous in nature – it must be paid according to its terms – only where fraud was involved that liability may be declined – the underlying contract has no effect on the guarantors' liability –

Prescription of claims in terms of guarantee – claim based on a guarantee is completely independent from the claim based on the main contract – the causes of action are different and separate – each with its own essential requisites and elements –

Claims against guarantors are based on the guarantee agreement in terms of which the giving of notice, in the form of the 'Guarantee Claim Notice', is a condition precedent for a claim –

Prescription defence raised by respondents rejected as bad in law – judgment granted in favour of the applicant.

ORDER

- (1) Judgment is granted in favour of the applicant against the first, the second and the third respondents, jointly and severally, the one paying the other to be absolved, for: -
 - (a) Payment to the applicant of the sum of R74 786 712.21;
 - (b) Payment of interest on the aforesaid sum of R74 786 712.21 at the rate of prime per annum, compounded monthly in arrears, from 31 August 2020 (the date of service of the application) to date of final payment, both days inclusive.
 - (c) Payment of the applicant's costs on the scale as between attorney and client.

JUDGMENT

Adams J:

[1]. On the 26th of September 2018, the fourth respondent ('Steval Engineering') was placed in final liquidation. As and at the aforesaid date of its final winding-up, Steval Engineering was indebted to the applicant ('IDC') for amounts representing monies lent and advanced by the IDC to Steval Engineering in terms of and pursuant to a revolving credit facility and a loan agreement concluded between them during 2016. As at 18 March 2020 the indebtedness of Steval Engineering stood at the following amounts: R17 437 335.69 (in terms of the revolving credit facility) and R57 349 376.52 (in terms of the loan agreement), totalling R74 786 712.21. According to the loan agreement, the said sum of R57 349 376.52 became repayable by Steval Engineering to the IDC on 30 December 2016 because of the former's breach of the said agreement, and, according to the revolving credit facility agreement, all the monies owing thereunder would immediately become repayable by Steval Engineering to the IDC in the event of the latter being placed in liquidation, that being, as we now know, 26 September 2018.

[2]. On 7 April 2016, the IDC and the first to third respondents ('the Guarantors') concluded a guarantee agreement (as a primary obligation) in each of their individual capacities, in terms of which the guarantors 'guarantee[d] all the obligations of [Steval Engineering] to and in favour of the IDC, jointly and severally and on the terms and conditions contained [therein]'. In terms of the 'Master Terms and Conditions' (clause 1.1.8) of the guarantee agreement, the guarantors specifically guaranteed all liabilities of Steval Engineering under the revolving credit facility and the loan agreement. The guarantors renounced any benefits to which they may be entitled in law as a result of the agreement and that confirmed that they were fully aware of the meaning and effects of the benefits and the renunciation thereof.

[3]. The first to the third respondents, as guarantors under the revolving credit facility and the loan agreement, are therefore indebted to the IDC to the extent of Steval Engineering's indebtedness to the IDC as set out above. On the 3rd and the 7th of June 2019, the IDC, through its attorneys, issued to the guarantors a 'Guarantee Claim Notice' as contemplated in and envisaged by the guarantee agreement, calling upon the guarantors to pay the monies as per the guarantee claim notice. However, three days passed without the guarantors complying with the said demands.

[4]. In this application, which came before me in the opposed Motion Court on Wednesday, 03 August 2023, the IDC applies to court for a money judgment against the first respondent, the second respondent and the third respondent, jointly and severally, for payment of the total amount of R74 786 712.21, together with interest thereon and costs of suit. In the answering affidavit, the respondents oppose IDC's application for judgment on a number of grounds, including on the basis of at least three legal points *in limine* relating to non-joinder of the liquidators of Steval Engineering, this court's lack of jurisdiction and lastly prescription. By the time the matter was heard before me on 30 August 2023, Counsel for the guarantors, Ms Reddy, gave an indication that they would not be pursuing the first two points *in limine*, leaving only the contention by the respondents that IDC's claim is prescribed as being time-barred. The approach adopted by the guarantors at the hearing of the application is, in my view, a prudent one as there is clearly no merit – none whatsoever – in the other points *in limine* raised by them.

[5]. Accordingly, the only issue which I am required to consider in this matter is whether the claim by the IDC against the guarantors have become prescribed. If so, the application falls to be dismissed.

[6]. I have no doubt that the IDC complied with the guarantee notice requirement as per the guarantee agreement. The important part of the said agreement is the 'Guarantee' provision, which reads as follows: -

'3 **Guarantee**

With effect from the effective date, the Guarantor(s) hereby, irrevocably and unconditionally guarantee(s), as a primary obligation in favour of the IDC the due, proper and punctual

performance by the Borrower [Steval Engineering] of the Guaranteed Liabilities including the full, prompt and complete payment of all the Guaranteed Liabilities when and at the same time shall become due whether or not any or all of the Guaranteed Liabilities are enforceable against the Borrower, and undertakes to IDC that each time a Guarantee Claim Notice is delivered to the Guarantor(s), the Guarantor(s) shall within 3 (three) Business Days after receipt thereof pay all sums claimed in such Guarantee Claim Notice.'

[7]. As submitted by Mr Salani, who appeared on behalf of the IDC, the guarantee clause provides that the guarantors irrevocably and unconditionally guaranteed, as a primary obligation in favour of the IDC, the due, proper and punctual performance by Steval Engineering of the guaranteed liabilities. Moreover, the guaranteed liabilities would become due whether or not any or all of the guaranteed liabilities were enforceable against Steval Engineering. Importantly, the guarantors undertook to the IDC that each time a guarantee claim notice is delivered to them, the guarantors shall within three business days after receipt thereof pay all sums claimed in such guarantee claim notice.

[8]. This is exactly what was done by the IDC through its lawyers, and there can accordingly be no debate about the liability of the guarantors to the IDC. The point is simply that the 'guarantee claim notice' triggers or should trigger payment to the IDC by the guarantors.

[9]. As was held by *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others*¹, the obligations created by a guarantee is wholly independent of the underlying contract and whatever disputes may subsequently arise between the parties to the underlying agreement is of no moment insofar as the guarantor's obligations is concerned. Payment by the guarantor is due once demand is made in the form envisaged by the guarantee.

[10]. That then brings me to the prescription point raised by the first to third respondents, who contend that, according to the IDC's own case, the amounts payable under and in terms of the loan agreement, fell due and therefore became repayable on 30 December 2016 and the monies advanced under and in terms of the revolving credit facility agreement became due and payable on

¹ *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA) at pg 90E – H;

commencement on business rescue proceedings against Steval Engineering, which occurred on 4 August 2017. Therefore, so the contention on behalf of the guarantors goes, the debts became due and payable on 30 December 2016 and 4 August 2017 respectively, which, in turn, means that their indebtedness to the IDC became prescribed on 29 December 2019 and 03 August 2020 respectively. The present application was served only on the 31st of August 2020, so the argument is concluded, by which time the claims had become prescribed. Therefore, IDC's application should be dismissed.

[11]. In *Lombard*,² the court held as follows:

'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.'

[12]. The trite point made by this authority is that the underlying contract has no effect on the guarantors' liability to the IDC, unless the existence of fraud is demonstrated, which is not the case in this instance. A claim based on a guarantee is completely independent from the claim based on the main contract and the cause of action in relation to the claim based on the guarantee is a different and separate cause of action, with its own essential requisites and elements. *In casu* those would consist, for example, of: (1) Performance by the main debtor, Steval Engineering, being due; (2) Default on the part of Steval Engineering; and (3). Guarantee claim notice having been given. The simple point is that a guarantee establishes a contractual obligation on the part of the Guarantor to pay the beneficiary in accordance with its terms.

[13]. What is more is that any defence that Steval Engineering might have had against a claim by the IDC, including that the claim has prescribed, is not available to the guarantors. In that regard see *Casey and Another v FirstRand Bank Ltd*³, in which the appellant sought an order declaring that the debt due to FirstRand Bank had become prescribed due to it not having been claimed within the three

² At pg 90E-H;

³ *Casey and Another v FirstRand Bank Ltd* 2014 (2) SA 374 (SCA);

year period prescribed by the Prescription Act. The Supreme Court disagreed and held as follows: -

‘The inherent flaw in this argument is that it seeks to equate the legal standing of a letter of credit with a suretyship. As pointed out in *Loomcraft* and in arts 3 and 9 (a) of the UCP, a letter of credit is wholly independent of the underlying contract between the customer of the bank and the beneficiary. It establishes a contractual obligation on the part of the issuing bank to pay the beneficiary in accordance with its terms. An irrevocable letter of credit is not accessory to the underlying contract and is distinguishable in law from a suretyship which is accessory to the principal obligation.’

[14]. The trite principle to be extracted from these authorities is that the IDC’s claim against the guarantors is not affected in any way by the underlying contract between it and Steval Engineering, nor by the fact that the IDC’s claim against Steval Engineering may or may not have prescribed. The Guarantors, being the first to the third respondents, are obligated to pay the guarantee in accordance with its terms – ‘each time a “Guarantee Claim Notice” is delivered to the Guarantors, [they] shall within 3 (three) business days after receipt thereof pay all sums claimed in such Guarantee Claim Notice’. This also implies that the IDC’s cause of action is only completed on the date on which the ‘Guarantee Claim Notice’ is dispatched to the Guarantors, which, in turn means, that, from a prescription point of view, the debt only becomes payable on such date.

[15]. There is a further reason why the prescription point of the Guarantors should fail and that relates to the principle, as *De Bruyn v Du Toit*⁴, in which Rogers J held as follows: -

‘It is only where the giving of notice is a condition precedent for a claim, and thus a necessary ingredient of the creditor’s cause of action, that the running of prescription is deferred until the giving of notice. See *Loubser Extinctive Prescription* 1996 at 53-63, where the authorities are reviewed. The learned author concludes his discussion thus (at 63):

“On account of the policy consideration that a creditor should not be able to rely on his own failure to demand performance from the debtor in order to delay the running of prescription the courts will require clear indication that the parties intended demand to be a condition precedent for the debt to become due, in which case prescription will only begin to run from the date of demand.”

⁴ *De Bruyn v Du Toit* (1162/2015) [2015] ZAWCHC 20 (27 February 2015);

[16]. Applying this principle *in casu*, I come to the conclusion that the IDC's claims against the Guarantors are based on the guarantee agreement in terms of which the giving of notice, in the form of the 'Guarantee Claim Notice', is a condition precedent for a claim. This then means that the three-year prescription period of the IDC's claims would only have started running on the date of demand, that being, as indicated above, the 3rd and the 7th of June 2019. These motion proceedings were therefore instituted well within time and well before the claims became time-barred. I am bolstered in this view and conclusion by the Constitutional Court in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*⁵, in which Mojapelo AJ, writing for the minority, held as follows: -

'Where there is such a clear and unequivocal intention, the demand will be a condition precedent to claimability, a necessary part of the creditor's cause of action, and prescription will only begin to run from demand. This, in my view, is not an incident of the creditor being allowed to unilaterally delay the onset of prescription. It is the parties, jointly and by agreement seriously entered into, determining when and under what circumstances or conditions a debt shall become due.'

[17]. Cameron J, writing for the majority, at para 124 makes the same point as follows: -

'For the parties to delay prescription is simple. They just have to say so. But they must say so.'

[18]. For all of these reasons, I am of the view that the legal point of prescription raised by the first to the third respondents is without merit and falls to be dismissed.

Conclusion and Costs

[19]. In sum, IDC has made out a case for the relief sought by it and judgment should therefore be granted in their favour against the first, the second and the third respondents.

[20]. As regards costs, the general rule is that the successful party should be given his costs, and this rule should not be departed from except where there are

⁵ *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at para 47;

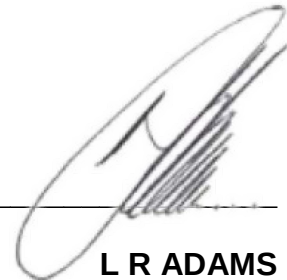
good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*⁶.

[21]. I can think of no reason why I should deviate from this general rule. The agreements in question provide that costs, in the event of litigation, should be awarded on the scale as between attorney and own client.

Order

[22]. Accordingly, I make the following order: -

- (1) Judgment is granted in favour of the applicant against the first, the second and the third respondents, jointly and severally, the one paying the other to be absolved, for: -
 - (a) Payment to the applicant of the sum of R74 786 712.21;
 - (b) Payment of interest on the aforesaid sum of R74 786 712.21 at the rate of prime per annum, compounded monthly in arrears, from 31 August 2020 (the date of service of the application) to date of final payment, both days inclusive.
 - (c) Payment of the applicant's costs on the scale as between attorney and client.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

⁶ *Myers v Abrahamson* 1951(3) SA 438 (C) at 455

HEARD ON:	2 nd August 2023.
JUDGMENT DATE:	14 th August 2023 – judgment handed down electronically
FOR THE APPLICANT:	Advocate Humbulani Salani
INSTRUCTED BY:	Tshisevhe Attorneys Incorporated (TGR Attorneys), Sandhurst, Sandton
FOR FIRST, SECOND, THIRD AND FOURTH RESPONDENTS:	Advocate Kerusha Reddy
INSTRUCTED BY:	Desiré Koch Attorneys Mbombela, Mpumalanga