

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2022-022086

DATE: 12TH JANUARY 2024

In the matter between:

SMBT (PROPRIETARY) LIMITED

Applicant

And

HOLLARD INSURANCE COMPANY LIMITED

First Respondent

CAPE ISLAND CONSTRUCTION (PTY) LIMITED

Second Respondent

CAPE ISLAND CONSTRUCTION (PTY) LIMITED

First Third Party

ABLE, CAMERON WARD

Second Third Party

RIMBAULT, JOHN MURRAY

Third Third Party

WIGG, CLINTON ST JOHN

Fourth Third Party

HODGES, GREGORY BRIAN

Fifth Third Party

Neutral Citation: *SMBT v Hollard Insurance and Others (2022/022086) [2024]*

ZAGPJHC --- (12 January 2024)

Coram: Adams J

Heard on: 02 August 2023

Delivered: 12 January 2024 – 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 11:00 on 12 January 2024.

Summary: Contract – specific contracts – Variable Construction 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in nature – it must be paid according to its terms – guarantor claiming that guarantee had expired and was therefore no longer valid –

Expiration of guarantee – interpretation of contracts – proper interpretation of the guarantee must be performed by applying established principles – *Endumeni Municipality* and *Coral Lagoon* cases – interpretation to be based on the ‘triad of text, context and purpose’ – the ‘ordinary’ or ‘literal’ meaning of a contractual provision may be departed from if it would be clearly contrary to the actual intention of the parties – or in order to avoid some absurdity or some repugnance or inconsistency with the rest of the contract – interpretation of contract should not lead to an absurd and an unbusinesslike result –

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

ORDER

- (1) It is declared that *Variable Construction Guarantee* number PS GUA 3692312 dated 13 April 2015 issued by the first respondent in favour of the applicant has not expired.
- (2) Judgment is granted in favour of the applicant against the first respondent for: -
 - (a) Payment to the applicant of the sum of R855 911.74.
 - (b) Payment of interest on the aforesaid sum of R855 911.74 at the applicable legal interest rate of 7,75% per annum from 09 June 2022 (being the date of first demand) to date of final payment.

- (3) The first and the second respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this opposed application.
- (4) Judgment is granted in favour of the first respondent against the first to the fifth third parties, jointly and severally, the one paying the other to be absolved, for: -
- (a) Payment to the first respondent of the sum of R855 911.74.
 - (b) Payment of interest on the aforesaid sum of R855 911.74 at the applicable legal interest rate of 7,75% per annum from 09 June 2022 (being the date of first demand) to date of final payment.
 - (c) Payment of the costs payable by the first respondent to the applicant as per prayer (3) above.
 - (d) Payment of the first respondent's costs of the Third Party proceedings.
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JUDGMENT

Adams J:

[1]. The applicant (SMBT) is the registered owner of immovable property in Kloof Road, Clifton, Cape Town ('the property'). On 20 March 2015, SMBT as 'Employer' concluded a written agreement (the Building Agreement) with the second respondent (CIC), which is also the first third party, as 'Contractor', pursuant to which CIC would build a new dwelling on the property ('the works') for the contract price of R42 795 598. The 'Principal Agent' of SMBT in terms of the Building Agreement was SBDS Quantity Surveyors, Western Cape ('the Principal Agent').

[2]. As it was obliged to do in terms of the building contract, CIC on 13 April 2015 caused to be issued by the first respondent (Hollard) a 'Variable Construction Guarantee' in favour of SMBT ('the guarantee'). On 9 June 2022, SMBT demanded payment of the amount of R855 911.74 from Hollard under the guarantee. On 14 June 2022, Hollard repudiated SMBT's demand on the basis

that the guarantee had expired, which is disputed by SMBT, which contends that, on a proper interpretation of the guarantee, the guarantee had not expired by the time demand was made and Hollard is therefore obligated to pay the amount demanded.

[3]. In these proceedings, which came before me on 9 November 2023 as a Special Motion, SMBT applies for an order declaring that the guarantee has not expired and for judgment in its favour against Hollard for payment of R855 911.74, together with interest and costs. It is common cause between the parties that the dispute between SMBT and Hollard turns solely on the proper interpretation of the guarantee, which is a matter for this Court to determine based on the wording and purpose of the Guarantee, in the light of the context provided by the Building Agreement.

[4]. A Third Party Notice has also been issued by Hollard against CIC (as first third party) as well as against CIC's sureties, being the second to the fifth third parties (collectively, 'the third parties'), in which Hollard seeks to hold the third parties liable, jointly and severally, to make payment to it of the full principal amount, together with interest, in the event of this Court granting judgment against it in favour of SMBT. The third parties have adopted the legal contentions raised by Hollard in its answering affidavit against the relief sought by SMBT but have indicated that they will otherwise abide the decision of this Court.

[5]. Accordingly, the only issue which I am required to consider in this matter is whether, by the time SMBT made demand in terms of the guarantee, same had expired. If so, the application falls to be dismissed. This issue is to be considered in light of the provisions of the guarantee, clause 3 of which makes it abundantly clear that it creates neither an accessory obligation nor a suretyship. Instead, the Guarantee imposes a primary obligation on Hollard to pay money, which is independent of the underlying Building Agreement¹. The purpose of the guarantee is to protect SMBT in the event of default by CIC and thus it is to the

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

guarantee that one should look to determine the rights and obligations of SMBT and Hollard – ‘the autonomy principle’.

[6]. The proper interpretation of the guarantee must be performed by applying the established principles articulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*² and *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd*³ based on the ‘triad of text, context and purpose’. Thus, as correctly submitted by Mr Price, Counsel for the applicant, while the guarantee establishes a primary obligation on Hollard that is autonomous from (and thus not accessory to) the distinct primary obligations imposed by the Building Agreement on CIC, the Building Agreement nonetheless remains part of the relevant context in the interpretation of the guarantee.

[7]. A convenient starting point in the interpretative process is the Building Agreement and its key provisions, which are the following.

[8]. In terms of clause 26, the Principal Agent shall issue a ‘certificate of final completion’ once the works have reached ‘final completion’ as defined, that is when the works are ‘free of all defects as certified by the principal agent’ (the final completion certificate).

[9]. Clause 34, in relevant part, provides that: (a) The principal agent shall issue the final account to the contractor within ninety working days of the date of practical completion (clause 34.1); and (b) Should the contractor not object with reasons to the final account within forty-five working days of receipt thereof, the principal agent shall issue the final payment certificate (clause 34.5).

[10]. Importantly, clause 34.5, with reference to ‘the final payment certificate’, reads as follows:

‘The principal agent shall issue the final payment certificate within seven calendar days to the contractor. Notwithstanding the foregoing such final payment certificate shall not be issued before the issue of the certificate of final completion other than where termination occurs’

[11]. From the foregoing, it is clear that the final payment certificate could never be issued prior to the issue of the final completion certificate. In terms of

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

³ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA).

clause 34.14, where the final payment certificate reflects an amount in favour of the employer, the contractor shall pay the amount certified within twenty-one calendar days of the date of issue of the final payment certificate.

[12]. What is envisaged in the foregoing provisions in fact occurred in that on 5 May 2022 the Principal Agent issued the final completion certificate. The very next day, being 6 May 2022, the Principal Agent issued the final payment certificate pursuant to clauses 31.1 and 34, certifying that CIC owed SMBT R2 130 687.49 (the certified amount). This then means that CIC was obliged, in terms of clause 34.13, to pay SMBT the certified amount within twenty-one calendar days, namely on or before 27 May 2022. CIC failed to do so.

[13]. On 1 June 2022, SMBT's attorneys wrote to CIC demanding that it pays SMBT the certified amount within seven calendar days of receipt of the demand, failing which SMBT intended to call upon Hollard, as guarantor, to make payment in terms of the guarantee (the contractor demand). Again, CIC failed to do so.

[14]. That then brings me to the Guarantee, the key provisions of which are as follows: The 'Guaranteed Sum' was stated to be a maximum aggregate amount of R4 279 558.69, and the form of the Construction Guarantee was to be 'variable'. Importantly, the 'Guarantee Expiry Date' is defined as 'On Issue of Final Completion Certificate', which definition, needless to say, Hollard places much store on.

[15]. Clause 1 of the guarantee, which is applicable and relevant *in casu*, provides that Hollard's liability under the Guarantee 'shall be limited to the diminishing amounts of the Guaranteed Sum' in four increments, according to a timeline of four distinct periods. The effect of this provision is that R855 911.74 is provided for as the guaranteed sum, as being for the period '[f]rom and including the day after the date of the applicable final completion certificate and up to and including the date of the final payment certificate where payment is due to the Contractor, whereupon this Construction Guarantee shall expire. Where the final payment certificate reflects payment due to the Employer, this Construction Guarantee shall expire upon payment of the full amount certified.' (Clause 1.1.4)

[16]. Importantly, clause 1.2 provides that:

‘For avoidance of doubt the Guarantor’s liability limits set out in [clause] 1.1.1 to 1.1.4 shall apply in respect of any claim received by the Guarantor during the period in question’.

[17]. On my reading of these provisions, this then clearly means that the guarantee was to expire only upon payment of the full amount certified. That is so for the simple reason that the final payment certificate certified that CIC owed SMBT the certified amount. It expressly follows that ‘the Construction Guarantee shall expire upon payment of the full amount certified’. Moreover, SMBT demanded payment from Hollard under the Guarantee on or about 9 June 2022. Thus, in accordance with clause 1.2, SMBT’s claim was received by Hollard ‘during the period’ contemplated by clause 1.1.4, being the period starting on 6 May 2022 (that is ‘the day after the date of the applicable final completion certificate’) and ending ‘upon payment of the full amount certified’ (which has yet to occur).

[18]. The guarantee provision of the Variable Construction Guarantee provides that, subject to the Guarantor’s maximum liability referred to *supra*, the Guarantor undertook to pay SMBT the sum certified upon receipt of the identified documents, which requirement SMBT complied with in their demand to Hollard. All of the other conditions were also complied with by SMBT.

[19]. As already indicated, despite demand by SMBT to Hollard for payment in terms of the guarantee, Hollard refused to make such payment on the basis that, in its view, the Guarantee had expired on 5 May 2022, being the date of issue of the final completion certificate. In that regard, Hollard relies, almost exclusively on its interpretation of the definition of ‘Guarantee Expiry Date’ as ‘On Issue of Final Completion Certificate’ in clause 1 (quoted above), as well as on clause 11, which provides (in the relevant part) as follows:

‘This Construction Guarantee ... shall expire in terms of either 1.1.4 or 2.1, or payment in full of the Guaranteed Sum or on the Guarantee expiry date, whichever is the earlier, where after no claims will be considered by the Guarantor. ...’

[20]. I do not accept the submissions on behalf of Hollard for the simple reason that its interpretation of the relevant provisions does not accord with the trite principles relating to the interpretation of written instruments. First, insofar as it may be necessary, the ‘ordinary’ or ‘literal’ meaning of a contractual provision

may be departed from if it would be clearly contrary to the actual intention of the parties, or in order to avoid 'some absurdity or ... some repugnance or inconsistency with the rest of the contract'⁴, or to give a contract a commercially sensible meaning. At the same time, however, interpretation cannot serve to create a new contract for the parties or to insert a term merely out of sympathy for a contracting party.

[21]. Secondly, in the exercise of interpreting documents, courts are slow to impute superfluity to a document and an interpretation which has this effect should not be readily accepted. The preferred approach is to give some effect rather than no effect to the words. Wallis JA in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*⁵ pointed out that '[a] sensible meaning is to be preferred to one that leads to insensible and unbusinesslike results or undermines the apparent purpose of the document'.

[22]. Thirdly, greater weight ought to be given to special provisions than to general provisions, it being presumed that the parties cannot have intended that a general provision should apply to a case covered by special words – *generalia specialibus non derogant*.

[23]. Fourth, according to the *contra proferentem* rule, a contract or its terms must, in cases of doubt and ambiguity, be construed against the party by whom or on behalf of whom it was formulated.

[24]. Fifth, it is well-established that a provision in an insurance agreement which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted.

[25]. Applying these principles *in casu*, I conclude that Hollard's interpretation of the guarantee is untenable, as it amounts to narrow literalism and because it entails a patent contradiction between the definition of 'Guarantee expiry date' and clause 11, on the one hand, and clause 1.1.4 quoted *supra*, on the other

⁴*Scottish Union & National Insurance Co Ltd v Native Recruiting Corp Ltd* 1934 AD 458 at 465-6, in which case 'the Court may modify the words just so much as to avoid the absurdity or inconsistency but no more'.

⁵ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA).

hand. As correctly contended by Mr Price, the former provisions, on Hollard's literalist interpretation, indicate that the Guarantee necessarily expired when the final completion certificate was issued on 5 May 2022. Clause 1.1.4, by contrast, explicitly confers a guarantee of R855 911.74 in relation to the period 'From and including the day after the date of the applicable final completion certificate...', namely after 5 May 2022.

[26]. What is more is that Hollard's interpretation accordingly has the effect that clause 1.1.4 is rendered meaningless and of no practical effect in circumstances such as the present, namely where the works required by the Building Agreement have been completed (and accordingly the Building Agreement has been performed rather than terminated), the Principal Agent issues a final payment certificate at the same time or after issue of the final completion certificate, as required by clause 34.5 of the Building Agreement and the final payment certificate indicates that the contractor owes an amount to the employer.

[27]. In these circumstances, namely 'Where the final payment certificate reflects payment due to the Employer', clause 1.1.4 explicitly and unambiguously provides that 'the Construction Guarantee shall expire upon payment of the full amount certified'. But 'payment of the full amount certified' by Hollard under the Guarantee could never take place prior to the issue of the practical completion certificate. This follows from the various time-periods and procedures imposed by the Building Agreement and the Guarantee (being the obviously relevant context), notably: (a) The Building Agreement requires the final payment certificate to be issued at the same time or after the final completion certificate; (b) Once the final payment certificate is issued and reflects an amount due to the employer, the contractor has twenty-one calendar days to pay; (c) The Guarantee then provides for an additional seven calendar days within which a contractor must not accede to an employer's demand for payment, before that employer may call upon the guarantor under the Guarantee.

[28]. The point, in summary, is that Hollard's literalist interpretation means that the Guarantee inevitably expired on the day the final completion certificate was issued, that is before the twenty-one-day period and seven-day period could even

begin to run. So Hollard could never be called upon to pay. Such a consequence is, in my view, in conflict with the plain wording of clause 1.1.4 of the Guarantee (which amounts to a 'special provision' rather than the 'general provision' that is contained in the definition of the 'Guarantee expiry date'). Additionally, it leads to an absurd and an unbusinesslike result, which, in any event, defeats the purpose of the Guarantee, namely to provide protection for SMBT in the event of CIC's default, including 'after the date of the applicable final completion certificate...'.

[29]. Moreover, Hollard's interpretation is also acontextual: it amounts to an impermissible 'narrow peering at words' that ignores the relevant context provided by the other provisions of the Guarantee as well as the Building Agreement. In particular, in terms of the Building Agreement, it was not legally possible for CIC to be in default of its obligation to pay SMBT the certified amount until twenty-one calendar days after issue of the final completion certificate and in terms of the Guarantee, it was not legally possible for SMBT to call upon Hollard to pay until a further seven calendar days after issue of the final completion certificate. However, on Hollard's literalist interpretation, the Guarantee inevitably expired on the day the final completion certificate was issued, that being before the twenty-one-day period and the seven-day period could even begin to run. So Hollard could never be called upon to pay.

[30]. These consequences which would inevitably flow from Hollard's narrow literal interpretation of the Guarantee are the very definition of absurd and unbusinesslike.

[31]. It is so, as submitted by Mr Price, that a proper interpretation of the Guarantee will avoid the absurd, unbusinesslike and acontextual consequences embraced by Hollard. The proper interpretation turns on the legal meaning to be ascribed to clause 11 (quoted *supra*) which, contemplates three situations (relevant to this dispute) in which the Guarantee will expire, being: (a) In terms of clause 1.1.4 – 'Where the final payment certificate reflects payment due to [SMBT], this Construction Guarantee shall expire upon payment of the full amount certified'; (b) On 'payment in full of the Guaranteed Sum'; or (c) 'on the

Guarantee expiry date', defined to be 'on the issue of the final completion certificate'.

[32]. According to Hollard's interpretation, the phrase 'whichever is the earlier' applies to all three situations. The alternative and, in my view, the correct interpretation which the words of clause 11 are equally capable of bearing, is that the phrase 'whichever is the earlier' applies only to the second and the third situations, namely on payment in full of the Guaranteed Sum, and – on issue of the final completion certificate.

[33]. I say that this is the correct interpretation as it is consistent with the text of clause 11 and, moreover, is supported by the presence of a comma after 'or 2.1' which indicates that the qualified ('whichever is the earlier') was intended to apply only to the circumstances set out after that comma ('or payment in full of the Guaranteed Sum or on the Guarantee expiry date'), being the third and fourth situations. Furthermore, as I have found above, Hollard's interpretation would render the cover provided by clause 1.1.4 to be meaningless and of no practical effect in circumstances where the works have been completed and the final payment certificate (which cannot be issued before the final completion certificate) reflects payment due by the contractor to the employer. By contrast, the alternative interpretation gives meaning and effect to clause 1.1.4, as well as the purpose of the Guarantee.

[34]. As alluded to *supra*, Hollard's interpretation also amounts to giving a 'general provision' – the general definition of 'Guarantee expiry date' – priority over a 'special provision' – the special expiry date set out in clause 1.1.4. However, our law adopts the opposite attitude: general words should not derogate from special words. The alternative interpretation ensures this.

[35]. Lastly, as contended on behalf of SMBT, where, as here, there is a genuine ambiguity in the meaning of clause 11, the *contra proferentem* rule should be applied, which militates against Hollard's interpretation and in favour of the interpretation contended for by SMBT. It is also so that an insurance agreement which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted.

[36]. For all of these reasons, I am of the view that the applicant should be granted the relief claimed by it in its notice of motion.

Conclusion and Costs

[37]. In sum, SMBT has made out a case for the relief sought by it and judgment should therefore be granted in its favour against Hollard. In its third party proceedings, Hollard claims indemnification against CIC and the other third parties in the event of judgment being granted against it in favour of SMBT. The third parties have indicated that they do not oppose the third party proceedings and would abide this court's judgment. Judgment in favour of Hollard against the third parties should therefore follow.

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

[39]. I can think of no reason why I should deviate from this general rule. I therefore intend granting SMBT its costs of the opposed application, to be paid by Hollard and CIC. As regards CIC, it is, as submitted on behalf of SMBT, that it, in aligning itself with the Hollard's case and by adopting the defences raised by Hollard, has actively opposed the application despite the fact that SMBT had indicated in its founding papers that it would not be seeking any relief against CIC. It would accordingly be fair for CIC to be held jointly and severally liable, with Hollard, for the latter's costs.

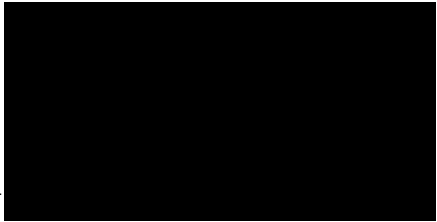
Order

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

- (1) It is declared that *Variable Construction Guarantee* number PS GUA 3692312 dated 13 April 2015 issued by the first respondent in favour of the applicant has not expired.

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

- (2) Judgment is granted in favour of the applicant against the first respondent for: -
- (a) Payment to the applicant of the sum of R855 911.74.
 - (b) Payment of interest on the aforesaid sum of R855 911.74 at the applicable legal interest rate of 7,75% per annum from 09 June 2022 (being the date of first demand) to date of final payment.
- (3) The first and the second respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this opposed application.
- (4) Judgment is granted in favour of the first respondent against the first to the fifth third parties, jointly and severally, the one paying the other to be absolved, for: -
- (a) Payment to the first respondent of the sum of R855 911.74.
 - (b) Payment of interest on the aforesaid sum of R855 911.74 at the applicable legal interest rate of 7,75% per annum from 09 June 2022 (being the date of first demand) to date of final payment.
 - (c) Payment of the costs payable by the first respondent to the applicant as per prayer (3) above.
 - (d) Payment of the first respondent's costs of the Third Party proceedings.



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

HEARD ON:	9 th November 2023.
JUDGMENT DATE:	12 th January 2024 – judgment handed down electronically
FOR THE APPLICANT:	Advocate Alistair Price
INSTRUCTED BY:	Slabbert Venter Yanoutsos Inc, Wynberg, Cape Town
FOR FIRST RESPONDENT:	Advocate Dwight Snyman
INSTRUCTED BY:	Moll Quibell and Associates Ferndale, Randburg
FOR SECOND RESPONDENT AND THE FIRST TO THE FIFTH THIRD PARTIES:	Advocate Gerhard Van Rhyn
INSTRUCTED BY:	George Whitehead Incorporated, George