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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No. 9841/21P

In the matter between:

INFINITI INSURANCE CO. LTD

APPLICANT

[Registration Number 2005/029823/06]

and

INKONKA CIVILS CC

FIRST RESPONDENT

[Registration Number 2006/011823/23]

VEDANTH AMRITHLAL

SECOND RESPONDENT

[Identity Number [...]]

ORDER

1. Payment of the sum of R2 508 059- 84 (two million five hundred and eight thousand and fifty nine rand eighty four cent).
2. Interest on the sum of R2 508 059.84 at the prescribed legal prime overdraft rate of Absa Bank of South Africa limited plus two percent (2%) from 7 May 2021 until payment in full.
3. Costs of suit on attorney and client scale.

JUDGMENT

Delivered on:

Mngadi, J

[1] The applicant seeks against the two respondents an order for payment of R2 508 059-84, plus interest and costs on an attorney and client scale. The respondents oppose the application.

[2] The applicant is Infiniti Insurance Company Limited a public company registered and incorporated in terms of the Company law of the Republic of South Africa. The first respondent is Inkonka Civils CC a close corporation duly registered and incorporated in accordance with the law. The second respondent is Vedanth Amrithlal an adult male.

[3] The applicant claim that at the instance of the first respondent, it issued a guarantee in favour of the third party for the obligation of the first respondent against an indemnity in its favour of which the second respondent stood surety. The third party in a demand called up the guarantee and the applicant honoured the guarantee in the sum of R2 508 059.84, the sum is now claimed from the respondents. The third party/employer is the Department of Rural Development and Land Reform Development.

[4] The respondents admitted the guarantee, the indemnity and the suretyship, as well as the calling up of the guarantee and the payment by the applicant. In my view, this makes it not necessary to canvass in this judgment the terms of the guarantee, the indemnity and the suretyship in details.

[5] The respondents rely on an answering affidavit deposed to by the second respondent. The second respondent states that the demand by the third party calling up the guarantee claimed that it terminated the contract relationship with the first respondent due to a default by the first respondent, which was incorrect. In fact, he claims, the third party repudiated the contract with first respondent. Therefore, he claims, the third party was not entitled to be paid in terms of the guarantee.

[6] The respondents in their heads of argument and orally during the hearing raised another defence namely, that the demand, by the third party was not a valid demand in that it was not accompanied by a notice of termination of the contract. I now consider the defences raised by the respondents.

[7] **Demand by the third party**

The applicant in the founding affidavit para 13 stated:

‘On or about 4 February 2021, the Employer addressed a letter of demand to the applicant for payment of the guaranteed amount of R2 508 059.84 due to the cancellation of the contract between the Employer and the First Respondent. A copy of the demand is attached hereto as FA4’. The answering affidavit responded as follows: ‘16 In terms of the performance guarantee (FA3 to the founding affidavit) in order to call up the performance guarantee, the Department was required to address a written demand to the applicant as it physical address indicating that the contract had been cancelled due to the contractor’s (First Respondent) default and to attach a termination notice and indicate that it was calling up the performance guarantee in terms of clause 5. In paragraph 24 in the answering affidavit, the respondents admitted the contents of paragraphs 13 and 14. FA4 was the letter of demand to the applicant. It stated:

‘ Calling up performance guarantee.

Reference is made to the above-mentioned project and your Guarantee No. PS GUA 0001 issued on behalf of Inkonka Civils CC for said contract.

Please take note that the contract with Inkonka Civils CC has been cancelled due to the contractor’s default. See attached correspondence.

In light of the above, you are hereby requested to honour the performance Guarantee No PS GUA 0001 as per paragraph 5.1 in the Guarantee?

[8] The relevant clause of the Guarantee (clause 5) provides:

'5 subject to the Guarantee's maximum liability referred to in 1, the Guarantor undertakes to pay the Employer the Guaranteed sum or the full outstanding balance upon receipt of a first written demand from the employer to the guarantor at the guarantor's physical address calling up this Performance Guarantee such demand stating that:

5.1 The contract has been terminated due to the contractor's default and that Performance Guarantee is called up in terms of 5 or

5.2

5.3 The aforesaid written demand is accompanied by a copy of the notice of termination.

[9] The applicant's counsel argued that the respondents were belatedly raising as an issue on facts admitted in the answering affidavit, and they should not be allowed to do so. Further, she contended that FA4 with the correspondence that accompanied constituted a proper demand as referred by clause 5 of the guarantee and the applicant was bound to comply with it. She argued that the respondents at all material times they had in their possession the copy of the notice of termination they have attached as VA4 to the answering affidavit.

[10] It is clear that the respondents in the answering affidavit admitted that the demand calling up the guarantee in form was proper. If they had raised any issue relating thereto in the answering affidavit, the applicant would have dealt with it in the replying affidavit. In my view, they cannot belatedly raise the issue. In addition, the issue is a non-issue. The demand was accompanied by correspondence relating to the termination of the contract and it specifically stated that the contract with first respondent has been terminated due to the first respondent's default.

[11] Applicant not entitled to pay in terms of guarantee.

The respondents in the answering affidavit state that the contract was terminated by the first respondent and not by the third party and the applicant was aware of that. Therefore, contends the respondents, the third party due to a default by the first respondent could not terminate the contract. In the alternative, the respondents contend that there is a dispute of fact on whether the contract was terminated by the third party due to the default by the first respondent or whether the third party repudiated the contract and the first respondent accepted the repudiation and cancelled the contract.

[12] The respondents argued that in a letter VA3 dated on 3 September 2020 they advised the applicant that the third party repudiating the contract and that the first respondent accepted the repudiation and terminated the contract on 10 September 2020. In the said letter it is pointed out that the third party is not entitled to call on the guarantee and that steps to do so shall be opposed. The respondents contend that the applicant relied on the say-so by the third party, it failed to make further enquiry. The respondents contend that the third party in stating that the contract was cancelled due to first respondent's default communicated a false representation, a misrepresentation amounting to fraud, which relieved the applicant from liability on the guarantee.

[13] In my view, the issue raised by the respondents relates to a dispute between first respondent and the third party. The applicant was not a party to that contract between the first respondent and the third party. The applicant was bound by the terms of the guarantee, the indemnity and the suretyship. Even if the applicant was informed of the dispute it could not take any position relating thereto. See *Cofare South Africa Insurance Co. Ltd vs East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA) paras 13-16.; *Dormell Properties 282 CC v Renasa Insurance Co. Ltd and Others NNO* 2011 (1) SA 70 (SCA) par 63.

[14] The applicant once presented with a demand compliant with the terms of the guarantee, it was obliged to honour the demand. The respondents contend that the applicant was required to investigate but they do not specify which clause of the

guarantee required the guarantor to investigate and they do not specify what the applicant was required to investigate, how and for what purpose. The respondents contend that there is a dispute of fact relating how and by whom the contractual relationship between the first respondent and the third party was terminated. In my view, that alleged dispute of fact is irrelevant in determining the applicant's relief against the respondents, therefore, it is not a real genuine dispute of fact as far as the applicant's claim is concerned. I am of the view that the matter may be decided on the papers. See *Room Hire Co. (Pty) Ltd. V Jeppe Street Mansions (Pty) Ltd.* 1949 (3) SA 1155 (T) at 1163

[15] The respondents without any averments establishing fraud on the part of the third party, in the answering affidavit contend that since the beneficiary of the guarantee committed fraud it was not entitled to payment in terms of the guarantee. In my view, the respondents have neither alleged nor shown, even *prima facie*, any case of fraud on the part of the third party, the applicant was made aware of. The fraud must be clear and obvious that the guarantor has notice. See *Lombard Insurance Co. Ltd v Landmark Holdings and Others* 2010 (2) SA 86 (SCA) para 20.

[16] The respondents seek to drag the applicant to the contractual dispute between the first respondent and the third party to which the applicant is not a party and which has no impact on the guarantee. Even the payment in terms of the guarantee has no bearing to the alleged dispute. The respondents argues that the application be referred for trial to enable first respondent to consolidate it with the action the first respondent intends to institute against the third party for damages. In my view, this is not necessary and it may result in prejudice to the applicant.

[17] The respondents in their heads of arguments listed the following as material facts: (a) On 10 December 2018 the third party concluded a construction contract with first respondent. (b) On 12 March 2019, the applicant at the instance of the first respondent issued guarantee in question in favour of the third party. (c) On 12 March 2019, first respondent issued the indemnity in favour of the applicant. (d) On 12 March 2019, the second respondent executed the deed of suretyship in favour of the applicant. (e) On 10 September 2020, the third party repudiated the contract and first respondent accepted repudiation and cancelled the contract. (f) On 3

January 2021, the third party issued the termination notice of the contract. (g) On 4 Feb 2021, the third party issued the applicant with a demand in terms of the guarantee. (h) On 19 Feb 2021, the applicant made a demand in terms to the Indemnity and the suretyship to the first respondent and the second respondent respectively. (i) On 7 May 2021, the applicant paid the third party in terms of the guarantee.

[18] In my view, the above material facts show that the respondents became aware of the demand calling up the guarantee on or about 4 February 2021. They did not take any steps to stop the applicant to pay in terms of the guarantee nor did they advise the applicant not to pay in terms of the guarantee and the reasons thereof. The applicant only paid in terms of the guarantee on 7 May 2021. It shows that they did not see any reason not to pay in terms of the guarantee. The effect of that is that at that time they did not see any reason not to honour the indemnity and the suretyship.

[19] It is found that the applicant was bound to pay the third party as per the demand issued in terms of the guarantee. The demand complied with the terms of the guarantee. The respondents have not established any defence to the claim of the applicant based on the Indemnity and suretyship. Judgment is granted in favour of the applicant against the first and second respondents, jointly and severally, the one paying the other to be absolved.

[20] It is ordered:

1. Payment of the sum of R2 508 059.84 (two million five hundred and eight thousand and fifty nine rand eighty four cent).
2. Interest on the sum of R2 508 059.84 at the prescribed legal prime overdraft rate of Absa Bank of South Africa limited plus two percent (2%) from 7 May 2021 until payment in full.
3. Costs of suit on attorney and client scale.

APPEARANCES

Case Number : 9841/2021P

Applicant : Infiniti Insurance Company Limited

Represented by : Ms K Mitchell

Applicant attorney : Moll Quibell & Associates
RANDBURG

Respondent : Inkonka Civils CC and Another

Represented by : PJ Blomkamp S.C.

Respondent's Attorney : Vathers Attorneys
PIETERMARITZBURG

Date of Hearing : 17 JANUARY 2023

Date of Judgment : 27 January 2023