

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 69330/2018

Heard on: 19 June 2019

Date of judgment: 26 June 2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

20/6/19

DATE

SIGNATURE

In the matter between:

INVESTEC BANK LTD

Applicant

and

LOMBARD INSURANCE COMPANY LTD

First Respondent

ESOR UITVLUGT (PTY) LTD

Second Respondent

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

[1] Applicant ("Investec") seeks payment from first respondent ("Lombard") of the sum of R 20 million pursuant to what applicant alleges is a performance guarantee issued by Lombard to Investec. A brief summary of the facts is as follows:

1.1 On 18 March 2013 Investec sold an immovable property, Portions 109 and 110, and the Remaining Extent of Portion 1 of the Farm Uitvlugt 434 to second respondent ("Esor"), the latter then being known as Manuscape (Pty) Ltd.

1.2 It was envisaged by the parties to the agreement that Esor would develop the property, and to that end, clause 7 of the agreement contained the following provisions:

"The purchaser will improve the Property by the installation of Internal services with a minimum cost of R 20 000 000.00 (TWENTY MILLION RAND) of which at least R 10 000 000.00 (TEN MILLION RAND) will be installed by no later than 31 December 2013 and the balance by no later than 31 December 2014. The purchaser will provide proof of these improvements as and when the work is completed.(sic)"

1.4 The aforesaid clause was inserted, presumably because partial payment of the purchase price of the property would be effected

upon transfer of each individual stand, and Investec was keen to see to it that the development came to fruition as soon as possible.

1.5 It is common cause that the contract lapsed for non-compliance with certain suspensive conditions, but was revived by a further agreement. This resulted in the property only being transferred on 15 January 2014, instead of by 28 February 2013, as envisaged by the parties. Due to the provisions of clause 12 of the agreement the time for performance in terms of clause 7 was therefore extended.

1.6 One of the preconditions to transfer being effected to Esor, was that the latter would have to provide a demand guarantee to Investec, guaranteeing the performance of Esor's obligations arising from clause 7 of the agreement. Consequently, on 14 October 2013 Lombards, acting at the behest of Esor, issued a document titled "Performance Bond". It is this document that is at the heart of the dispute between the parties.

THE PERFORMANCE BOND

[2] Clause 1.2 of the performance bond/guarantee reads as follows:

"It is a condition of the Agreement that the purchaser provides a demand guarantee for the due and proper performance by it of its obligations in terms of Clause 7 of the Agreement"

[3] Clause 2 provides:

"2.0 UNDERTAKING

- 2.1 *The Guarantor hereby undertakes to pay the Seller forthwith on receipt of written notice from the Seller that the Purchaser has defaulted in terms of its obligations in terms of Clause 7 of the Agreement up to a maximum of R 20 000 000.00 (Twenty million Rand)*
- 2.2 *Payment will be made by the Guarantor, irrespective of the reason which caused the Purchaser to default and the Guarantor waives any defense which the Purchaser may have against the Seller's claim.*
- 2.3 *The Guarantor hereby renounces each and every benefit which might otherwise be available in law against the Seller in particular the benefits of excussion and division, cession of action, being sued together and the right to claim accounting from the Seller before making payment, with the Guarantor acknowledges that it knows and understands the meaning and full force and effect of such benefits."*

[4] The relevant portion of clause 3 reads:

"3.0 GENERAL

3.1 *The Seller has the absolute right to arrange its affairs with the purchaser in any manner which the Seller deems fit and without being advised thereof the Guarantor shall not have the right to claim its release on account of any conduct alleged to be prejudicial to the Guarantor. Without derogating from the foregoing any compromise, extension of the construction period, indulgence, release or variation of the Purchaser's obligations shall not affect the validity of this guarantee.*

3.2 *.....*

3.3 *This guarantee shall become effective upon registration of the properties referred to in Clause 1.1 above into the name of the Purchaser. Such guaranteed amount shall be reduced over the period based on work certified for Internal Services as per Clause 7.*

3.4 *This guarantee is neither negotiable nor transferable, and shall remain valid until the Purchaser's obligations in terms of Clause 7 have been fulfilled under the Agreement or upon payment of the Guarantee in terms of this agreement."*

[5] On 14 August 2018 Investec gave notice to Lombard that it was exercising its rights arising from the guarantee, and it claimed payment of the sum of R 20 million. It stated:

“Manuscape has failed to comply with its obligations in terms of the heads of agreement, more in particular its obligations in terms of clause 7 thereof which provides that the purchaser would improve the property in question by the installation of internal services with the minimum cost and deadlines as indicated in the said clause 7 of the agreement.”

[6] Lombard expressed the view, in a letter dated 21 August 2018, that clause 7 required the installation of the first tranche of services to the value of R 10 million by 15 October 2014 (the adjusted date due to the delay in transfer). In view of the fact that more than three years had elapsed since the date when those improvements were due, so the thinking went, Investec’s right to claim against the performance guarantee for those particular services had prescribed. Lombard agreed that the claim for the services due by 31 December 2014 (with the date adjusted to 15 October 2015) had not prescribed, and it duly paid R 10 million to Investec.

[7] Investec took the view that Lombard’s liability under the guarantee was absolute and unconditional, and that the obligation to pay stood wholly independent of the underlying contract. It asserted that the liability under the performance guarantee could thus not have prescribed. That is the dispute that stands to be resolved.

[8] In argument Mr. Mc Aslin, counsel for Lombard, pointed out that one should not take it for granted that the document is necessarily a demand/performance guarantee in the true sense of the word, in other words, that it created a liability independent of the underlying contract. It was argued that the reference to

clause 7 of the underlying agreement in the performance bond meant that one had to refer to clause 7 to determine what obligation was being guaranteed. The fact that the performance bond referred to clause 7 of the underlying agreement, it was submitted, took the performance guarantee out of the realm of a pure guarantee that stood independent of the underlying agreement. According to Lombard, because the obligation to develop the property was, in terms of the underlying agreement, to be performed by a certain date, the right to demand payment on the performance guarantee would arise on that date, and would prescribe three years thereafter.

PERFORMANCE BOND

[9] A performance guarantee is the same as a construction guarantee in our law, and they are the same as performance or construction bonds as they are referred to in English law. (***See: Minister of Transport and Public Works, WC v Zanbuild Construction (Pty) Ltd 2011 (5) SA 528 (SCA)***). The first question to determine is whether the "performance bond", as the document is titled, is in its nature a true performance guarantee, which creates obligations for the guarantor independent of the underlying agreement, or whether it is in the nature of a suretyship which guarantees the principal's contractual obligations, and would therefore require reference to the underlying contract to determine what those obligations were.

[10] I was pointed to the judgment of ***Vossloh Aktiengesellschaft v Alpha Trains (UK) Limited [2010] EWHC 2443 (Ch)*** in which Blackburn J examined the difference between a suretyship (to which he sometimes refers in the

judgment as a guarantee) and an indemnity (a performance bond or guarantee in our parlance). The test to determine the nature of the document is stated as follows:

"Because the parties are free to make any agreement that they like, each case must depend upon the true construction of the actual words in which the surety's obligations is expressed. This involves 'construing the instrument in its factual and contractual context having regard to its commercial purpose', a task which the court approaches 'by looking at it as a whole without any preconception as to what it is.' "

[11] It has often been held that in interpreting a contract, a court must objectively consider the ordinary grammatical meaning of the words used by the parties. In **Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd 1974 (1) SA 641 (A)** it was stated that:

"The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties (Jonnes v Anglo African Shipping Company (1936) Ltd 1972 (2) SA 827 (AD) at 834 E). Very few words, however, bear a single meaning and the 'ordinary' meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire contract."

(See also: **Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd [2017] ZACC 32 at par. 55**)

[12] In **Vossloh** (*supra* at par. 21) a suretyship is described as a contract by which one person agrees to answer for the existing or future liability of another, the principal, by which the surety's liability is in addition to, and not in substitution of, the liability of the principal. The surety promises the creditor that it will be responsible for the due performance of the principal's obligations, should the principal fail to perform them. In contrast to a suretyship stands the performance guarantee or performance/construction bond. The latter's essential distinguishing feature is, in the words of Blackburne J, that the liability of the guarantor is a primary obligation, which is wholly independent of the liability of the principal. Whatever disputes may arise from the underlying transaction are of no moment to the liability of the guarantor under the performance bond. Payment by the guarantor is due once demand is made in the form envisaged by the performance guarantee.

[13] As pointed out in **Lombard Insurance Company Ltd v Landmark Holdings (Pty) Ltd**:

"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."

(See also: **Minister of Transport** (*supra* at 532 C); **Dormell Properties 282 CC v Renasa Insurance Co Ltd and others** NNO 2011 (1) SA 70 (SCA) at 90 I to 91 A); **Edward Owen Engineering Ltd v Barclays Bank International Ltd** [1978] 1 All ER 976 (CA));

[14] The purpose of a performance/payment guarantee is to assure a contracting party that it will be paid, or that it will receive value for its performance. The party requiring a performance guarantee wants to be unaffected by controversies or disputes that are extraneous to the performance guarantee. (See: *Toopvar Investment (Pty) Ltd and others v Guardrisk Insurance Co Ltd and another, an unreported case of the Gauteng Local Division, case number 24787/2018 dated 26 April 2019*)

[15] The performance guarantee in this instance specifically records that Lombard undertakes, upon written notice by Investec that Esor has defaulted on its obligations in terms of clause 7 of the agreement, to effect payment up to a maximum of R 20 million. Payment is due irrespective of the reason for Esor's default, and whatever defence Esor may have, is not available to Lombard. Investec has the absolute right to arrange its affairs with Esor in any manner as it deems fit, and Lombard is not entitled to claim its release on account of any prejudicial conduct. A compromise, extension of the construction period, indulgence, release or variation would not affect the validity of the guarantee.

[16] The aforesaid clauses clearly place an independent and primary obligation on Lombard to pay up to R 20 million to Investec, upon proper demand having been made. The wording of the document also accords with the nature of the transaction. Quite often, in contracts of this nature, performance guarantees are required by either one of the parties.

[17] There was some debate by Mr Mc Aslin as to whether the word "notice" in clause 2.1 has the same connotation as the word "demand". The suggestion is

that because the word “notice” is used, as opposed to “demand” the guarantee is not a performance guarantee. This is, in my view, semantics. If the guarantee fulfils the requirements set out above, it is a performance bond.

[18] My view is that the underlying contract has no effect on Lombard's liability to Investec, unless fraud is shown, which is not the case in this instance. Any defence that Esor might have had, including that the claim has prescribed, is not at Lombard's disposal. My view is strengthened by the matter of **Casey and Another v FirstRand Bank Ltd 2014 (2) SA 374 (SCA)**. In this case the Court was faced with very similar facts. FirstRand had extended credit to Casey, which had been secured by a letter of credit which was payable on demand of FirstRand, stating that:

“Kimberley Roller Mills (Pty) Ltd has not met his/its obligation to First National Bank of Southern Africa Ltd in respect of the facilities granted by First National Bank of Southern Africa Ltd.”

[19] Casey sought an order declaring that the debt due to FirstRand had prescribed due to it not having been claimed within three years. In finding that the claim for payment by the guarantor had not prescribed, Swain AJA remarked 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."

[20] The authorities are therefore clear: The guarantor is not entitled to raise any defence that the party to the agreement would have had. Prescription might well have commenced running in respect of a claim by Investec against Esor, when the dates for performance came and went, and a claim by Investec as against Esor might have prescribed, but that does not affect Lombard's liability under the guarantee. Lombard must pay a guarantee of this nature in accordance with its terms. (***See: FirstRand Bank Ltd v Brera Investments CC 2013 (5) SA 556 (SCA) at 558 H***)

[21] Mr Mc Aslin asked rhetorically, when then, if the date for performance in terms of the agreement were not the date on which prescription commenced, would the right to claim against the performance guarantee prescribe. He suggested that the guarantee might be enforceable forever, which is off course not desirable from a policy point of view. My view is that the answer lies in the reading of the performance guarantee itself.

[22] Section 12 (1) of the Prescription Act, Act 68 of 1969 reads:

"(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due."

[23] What the words “debt is due” means, has been the subject of many judgments. In ***Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd 2017 (1) SA 185 (SCA)*** the position laid down in ***Truter v Deyssel 2006 (4) SA 168 (SCA)*** was confirmed, that a debt is due when it is claimable by a creditor, and conversely, is payable by the debtor.

[24] In ***Standard Bank of SA Ltd v Oeanate Investments (Pty) Ltd 1995 (4) SA 510 (C)*** it was held that a loan without agreement as to when it is to be repaid is payable upon demand, which means that it becomes repayable immediately when it is incurred. However, an exception to the general rule was noted in ***De Bruyn v Du Toit [2015] ZAWCHC 20*** where it was held that where the parties agree that the giving of notice is a condition precedent to a claim, and is thus a necessary ingredient to a creditor’s cause of action, the running of prescription would only commence when notice is given. Parties are entitled, in entering into an agreement, to determine when prescription will commence running, even if the agreement operates to the detriment of one of the parties (***See: Barkhuizen v Napier 2007 (5) SA 323 CC at 341 C to D***). This principle was affirmed by Mojapelo AJ, writing for the minority of the Constitutional Court in ***Trinity*** (*supra at par. 47*):

“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.”

[25] Cameron J, writing for the majority in *Trinity* (at par 124) makes the same point:

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

[26] Having pointed out that the parties to an agreement can agree on when prescription will commence, I turn once again to the guarantee. Clause 3.4 specifically states when the guarantee will lapse, and at the risk of repetition, I quote it again:

“This guarantee is neither negotiable nor transferable, and shall remain valid until the Purchaser’s obligations in terms of Clause 7 have been fulfilled under the Agreement or upon payment of the Guarantee in terms of this agreement.”

[27] In my view the parties agreed that the guarantee would only lapse once one of two scenarios have occurred, either Esor had complied with its obligations, or payment had been effected in terms of the guarantee. It did not lapse, as Lombard argues, three years after performance in terms of the agreement became due. Consequently I find that Investec’s right to claim in terms of the guarantee had not prescribed when demand for payment was made.

[28] There was some debate about whether the debt was divisible. However, in view of my finding, I do not have to deal with these submissions. It was pointed out to me in the papers that the claim was currently not for R 20 million, but for R 10 million, Lombard having already paid the balance to Investec.

[29] I therefore make the following order:

29.1 First Respondent shall pay the sum of R 10 000 000.00 (ten million rand) to Applicant, plus *mora* interest thereon at the rate of 10% per annum from 28 August 2018 to date of payment;

29.2 First Respondent shall pay the costs of the application.



J.J.C. Swanepoel
Acting Judge of the High Court,
Gauteng Division, Pretoria

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