

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
23/3/2015	<i>[Signature]</i>
DATE	SIGNATURE

23/3/15

CASE NUMBER: 82743/2014

In the matter between:

MEGA FREIGHT SERVICES (PTY) LTD

APPLICANT

and

LOMBARD INSURANCE COMPANY LTD

FIRST RESPONDENT

TRANSNET PORT TERMINALS

SECOND RESPONDENT

JUDGMENT

TLHAPI J

[1] This application was brought by way of urgency for the following relief:

"THAT a *rule nisi* be issued calling upon the respondents to show cause, if any, on or before the 9th day of December 2014 at 10h00 or so soon as counsel may be heard why an order should not be granted in the following terms:

- (a) That the first respondent be interdicted and restrained from making payment to the second respondent under Guarantee No. S48924;
- (b) That in the event of the matter being opposed by either of the respondents those respondents opposing the application are directed to pay costs of the applicant jointly and severally;
- (c) Further and/or alternative relief;

3.

That paragraph 2(a) shall operate as an interim interdict with immediate effect; “

The application was opposed by the second respondent. After hearing argument on behalf of both parties an order as formulated on behalf of the applicant was made on 5 December 2014:

- “1. *First Respondent is interdicted and restrained in making payments to the second respondents under guarantee number S48924 in respect of any claim arising from tariff annexure agreement concluded on 2 December 2013 and 3 December 2013 between Megafreight Services (Pty) Ltd as agent for Anelin-Bay Enterprises (Pty) Limited trading as African Star Mineral and Transnet Port Terminals, a division of Transnet SOC Limited*”, and

I ordered further,

- 2. That second Respondent is ordered to pay costs of the applicant including costs of senior counsel.

The order given was such that it protected the interests of the parties to the Deed of Suretyship and only interdicted the first respondent from honouring payment in respect of indebtedness arising out of the Tariff Annexure Agreement.

My reasons now follow:

BACKGROUND

[2] The applicant conducts business as an 'international freight forwarder' and the second respondent conducts business nationally from all sea ports in South Africa. The applicant operates a number of credit facilities with the second respondent, which facilities enable '*applicant to conduct its business and vary depending on the requirement of the transaction*'. Account 12554 was in respect of 'applicant's operation at the Richards Bay Port' which was secured with the first respondent to a maximum of R590 000.00. The said account had prior to July 2013 enjoyed a credit limit with the second respondent of R920 000.00.

[3] The applicant secured as agent, a bulk coal export contract for its principal Anelin-Bay Enterprises (Pty) Limited, trading as African Star Minerals ('Applicant's Principal'). The exports were to be effected through the Richards Bay Port Terminal. The second respondent required that:

- (a) The applicant increase its credit facility with the second respondent which had to be secured by way of suretyship, which was provided by the first respondent. The guarantee called for to secure the credit facility was in the

amount of R8 862 000.00. A guarantee was consequently issued by the first respondent in favour of the second respondent in that amount.

(b) A Tariff Annexure Agreement (the 'TAA') had to be concluded between the second respondent and applicant's principal.

[4] On 16 July 2013 the applicant sent a letter to the second respondent seeking an increase in its credit limit for account 12554. The suretyship for the account though headed "Guarantee No.S48924" was issued on 6 November 2013. The Tariff Annexure Agreement in respect of (b) between the second respondent and applicant's principal was concluded December 2013.

[5] The applicant also annexed the first draft of the TAA which had a clause 11.4 asking for a guarantee equivalent to the same amount as stated in the guarantee issued on 6 November 2013 headed No.S48924. Clause 11.4 was excluded from the TAA finally concluded on 2 and 3 December 2013. The applicant averred that suretyship was for the applicants credit facility on account 12554 and not meant to secure the indebtedness of the applicant's principal out of the TAA.

[6] Applicant's Principal had been in breach of its agreement with the second respondent in relation to the minimum quantities of coal to be exported per annum and, on 15 May 2014 the second respondent contended that applicant was indebted to it in the amount of R14 520 000 in respect of the penalties as per the TAA. The applicant contended that in the TAA it was described as an agent for a disclosed principal/customer and that it was not the customer. Negotiations to resolve the problem failed and the second respondent, having frozen applicant's credit facilities and in order to reactivate such credit facility, the applicant was forced to pay the

sum of R7 782 007.84, which it intends reclaiming from the second respondent.

[7] On 12 November 2014 the second respondent indicated its intention to call up the guarantee with the first respondent. The applicant contended that the second respondent was not entitled to call up the guarantee.

[8] The second respondent first raised certain points *in limine* to the application;

- (a) That the application was not urgent;
- (b) That the North Gauteng High Court lacked jurisdiction to hear the matter;
- (c) That the North Gauteng High Court lacked jurisdiction to entertain a maritime claim;
- (d) That there had been a material Non-Joinder of applicant's principal.

[9] The second respondent averred that the guarantee of the 6 November 2013 was specifically provided to secure the shortfalls under the TAA concluded on 2 December 2013 and that the applicant had failed to make out a case in its founding affidavit that the guarantee served to give security for other business of the applicant.

[10] Correspondence exchanged between Paul Munn, deponent to the founding affidavit and one Amanda Mfeke of the second respondent were annexed to the answering affidavit and, second respondent contended that it was clear from these exchanges that the applicant had put up the guarantee in terms of the first draft TAA and that it was for this reason that clause 11.4 was excluded from the TAA signed on 2 and 3 December 2013. It contended further that the applicant had put up the

guarantee for this purpose and, the second respondent was caused to contract with applicant's principal based on such guarantee. The applicant was consequently estopped from denying liability under the suretyship. The second respondent contended that it was recognized practice for the agent to put up security for the customer and the applicant had acknowledged its indebtedness in this regard and had made payment.

THE ISSUES

[11] The issues here are whether the guarantee issued by the first respondent was meant to secure only the increased credit facility of the business of the applicant at the Richards Bay Port or whether it was mainly put up to secure the indebtedness of applicant's principal, under the TAA signed on 4 December 2014 or both.

THE POINTS *IN LIMINE*

[12] I have considered both counsels submissions and argument and thus find:

Urgency: The urgency arose when the second respondent persisted in seeking payment under the suretyship for the indebtedness of the applicant's principal, despite protestations by the applicant, and according to it, there being no other remedy available to it and being at risk of shouldering a liability that was not attributable to it, I was satisfied that a case had been made out for urgency

Lack of jurisdiction: I am in agreement with Mr Maritz that there was no *'factual allegation in the affidavits on the basis on which the court could find that there Deed of Suretyship was given as a guarantee for 'maritime services'*

Is it a maritime claim: This also ties in with above point on lack of jurisdiction. The determining factor is whether the guarantee was given in respect of the TAA, and I shall touch on this issue below.

Non-joinder: The determining factor is whether the Deed of Suretyship not only covered the applicants increased credit facility but was also meant to secure the indebtedness of the applicant's principal under the TAA. If answered in the negative then it is not necessary to join the principal and this shall be dealt with below

THE SURETYSHIP

[13] Mr Maritz for the applicant submitted that a valid contract of suretyship had to comply with section 6 of the General Law Amendment Act of 1956, which required that it be in writing and '*signed by or on behalf of the surety*' and that in addition to the identification of *the 'surety (first respondent) , creditor (second respondent) and debtor (the principal debtor), there had to exist a valid principal debt between the debtor and the creditor'*. The suretyship did not incorporate the TAA as an annexure or it did not form part of the suretyship. Introduction of any evidence relating to '*negotiations and consensus between the parties which seeks either to add to or contradict the express terms of the Deed of Suretyship*' was inadmissible, *Sapirsten vs Anglo African Shipping Co (SA) Limited* 1978 (4) SA 1(A). He went on to submit that the principal debt identified in the suretyship was one "*arising out of a credit account agreement entered into between the debtor and Transnet and to which this guarantee becomes an annexure*".

[14] Mr Pillay for the second respondent submitted that it had always been the stance of the second respondent that the guarantee was put up to secure

‘indebtedness for volume shortfalls’. There was no dispute of fact, the second respondent had not only confirmed that the guarantee related to the credit facility, it also contended that the guarantee requested under clause 11.4 of the draft TAA was intended to secure the indebtedness of the principal agent and, that this position was evidenced in emails from the applicant dated 20 November 2014 and 27 November 2013 (‘RA1’ and ‘RA2’). Furthermore, in this instance the applicant did not deny that the guarantee was put up to secure the principal debt under the TAA and, that it was common trade practice for the agent to put up such security, *Easigas (Pty) Ltd v Solgas (Pty) Ltd*, 2009 (4) SA 37 (W).

[15] The facts in *Easigas supra* were distinguishable in that there the issue was about unlawful trade and competition, where the court had to determine the meaning of trade usage in the gas and gas cylinder trade. In *Sapirsten supra* the court had to determine what extrinsic evidence could be used to prove terms of a suretyship. Trengove AJA at 12 C-D said:

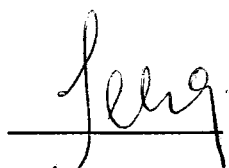
“.....there can be no objection to extrinsic evidence of identification being given, either by the parties themselves, or by anyone else, unless the leading of such evidence can be said to amount to an attempt to supplement the terms of the written contract”

In light of the above, I am in agreement with the submission by Mr Maritz that the guarantee can only serve as security for the TAA if it has been incorporated in the Deed of Suretyship. The credit account agreement was therefore in respect of account number 12554 for which an increased credit facility was applied for by the applicant.

[16] While the second respondents conceded that the agent was not liable for the indebtedness of a disclosed principal, it cannot be that it again wants to say that in this instance, and in as far as the TAA was concerned, the applicant was also the customer. In my view in order to claim entitlement in the guarantee the second respondent had to prove that the guarantee itself related to the TAA and to the applicant as principal debtor under the TAA and suretyship and that the TAA was an annexure to the guarantee or incorporated therein.

[17] Mr Maritz argued that unless the second respondent sought to rectify the Deed of Suretyship on grounds that there was a common error between *'the applicant, the first respondent, the second respondent as to the principal debt and the identity of the principal debtor....any evidence at variance with the express terms of the Deed of Suretyship is inadmissible'*, I agree. In my view there is therefore no merit in the points *in limine* relating to the claim as being a maritime one and on the non-joinder issue.

[18] I gathered from the answering affidavit and from the argument by Mr Pillay that the second respondent persists to hold applicant liable under the guarantee despite the legal position advanced. I am therefore satisfied that there was no other remedy available the applicant and that it had made out a case interdicting and restraining the first respondent from making payment to the second respondent in respect of indebtedness arising out of the TAA.



TLHAPI V V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON : 5 DECEMBER 2014
JUDGMENT RESERVED ON : 5 DECEMBER 2014
ATTORNEYS FOR THE APPLICANT : SHEPSTONE & WYLIE ATT
c/o MARITS SMITH VAN EEDEN