



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 13691/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	

NKOSI AJ	DATE: 22 NOVEMBER 2024

In the matter between:

NIEMAND, LUCAS JURIE

Appellant

and

THE HOLLARD INSURANCE COMPANY LIMITED

Respondent

In re:

THE HOLLARD INSURANCE COMPANY LIMITED

Applicant

and

WAMESCHSI GROUP (PTY) LTD

First Respondent

NIEMAND, LUCAS JURIE

Second Respondent



Delivery: - This judgement was delivered electronically by means of email to the legal representatives of the parties and uploaded on Case Lines. The judgement is deemed to be delivered on the 22nd November 2024.

JUDGEMENT

NKOSI AJ.

- [1] This is an application for leave to appeal to the Supreme Court of Appeal, alternatively to a full bench of this division, against the whole of the judgment and order of this Court delivered on 10 April 2024. The application is opposed.
- [2] The application is premised on the provisions of Section 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013. It is submitted by the appellant that the application has reasonable prospects of success and that there are other compelling reasons why the appeal should be heard.
- [3] The parties are *ad idem* concerning the applicable test for this application to succeed. Should there be prospects of success on appeal or if there are compelling reasons for the appeal to be heard, leave to appeal should be granted. The appellant relied on the ratio in *Ramakatsa v African National Congress* and another¹ in his submission regarding the applicable test.

¹ *Ramakatsa and others v African National Congress and another* (724/2019) [2021] ZASCA 31 (31 March 2021) at para 10



- [4] In *Air Chefs SOC Limited v The Public Protector of Republic of South Africa and Others*², Adams J noted that the ratio in *Ramakatsa* simply followed *S v Smith*³, and I agree. In *S v Smith* the Court held....

“What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

- [5] It is prudent at this stage to outline the factual background to this appeal before moving to deal with the grounds of appeal and the legal principles relevant thereto.
- [6] It is common cause that the appellant’s indebtedness to the respondent emanates from a Deed of Indemnity and Suretyship (“the Indemnity”) which he executed in favor of the respondent. In terms of the Indemnity, the appellant bound himself as a co-principal debtor, *in solidum*, for the due payment by the first respondent⁴ in the main application

² Case No. (31083/2020) [2024] ZAGPJHC unreported (heard on 29 February 2024) at para 7

³ *S v Smith* 2012(1) SACR 567 (SCA) [2011] ZASCA 15 at para 7

⁴ WAMESCHSI GROUP (PTY) LTD, which is not part of these proceedings. The application for leave to appeal concerns Niemand and Hollard.



("Wameschsi") to the respondent herein, of all and any amounts which the respondent is called upon to pay under the Guarantee.

- [7] The appellant also undertook to pay the respondent on demand any sum or sums of money which the respondent may be called upon to pay under the demand in terms of the guarantee whether or not the respondent shall, at such date, have made such payment, and whether or not Wameschsi or the appellant admits the validity of such claims against the respondent.
- [8] It is further common cause that on or about 09 July 2020 and 26 June 2019, the respondent issued guarantees for the amount of R6, 500, 000.00 (Six million five hundred thousand rand) and R3, 505, 138.90 (Three million five hundred and five thousand one hundred and thirty-eight rand and ninety cents) respectively, at the request of Wameschsi.
- [9] The nub of the disagreement in this application is the appellant's contention that the guarantees were subject to specific conditions that had to be fulfilled. Further, that the compliance with these conditions had to be demonstrated in the founding affidavit in the main application. He submitted that the respondent failed to observe and comply with the conditions. He further contends that the respondent failed to demonstrate in its founding affidavit that it complied.
- [10] The appellant mentioned in his heads of argument the conditions of the guarantee he refers to and states the following:

"... hereby irrevocably undertakes to pay you the Contractor, any sum or sums not exceeding in total the amount of R6 500 000.00 ...("the guaranteed



- [11] The above conditions concern the Advance Payment guarantee of R6, 500, 000.00. The other guarantee for R3, 505, 138.90 is a Performance Guarantee and does not have such conditions.
- [12] It was further submitted that the contractor could not submit a demand for payment without complying with these specific conditions already mentioned above⁵, and that the respondent was not obligated to pay. Consequently, the appellant cannot be held liable for payment made to the contractor by the respondent.
- [13] The appellant referred court to the decision in *Guard Risk Insurance Company Ltd v Kentz (Pty) Ltd*⁶ wherein Theron JA (as she was then), in dealing with the difference between the two types of guarantees, quoted from the case of *Minister of Transport and Public Works, Western Cape and Another v Zanbuild Construction (Pty) Ltd and Another*⁷ wherein Brand JA said:

".... a claimant under a conditional bond is required at least to allege and – depending on the terms of the bond – sometimes also to establish liability on the part of the contractor for the same amount. An 'on demand' bond, also referred to as a 'call bond', on the other hand, requires no allegation of liability on the part of the contractor under the construction contracts. All that is required for payment is a demand by the claimant, stated to be on the basis of the event specified in the bond".

⁵ Para 10 *supra*

⁶ *Guard Risk Insurance Co. Ltd v Kentz (Pty) Ltd* (94/2013) [2013] ZASC 182; [2014] IALLSA 307 (SCA) (29 November 2013) at para 10

⁷ *Minister of Transport and Public Works, Western Cape & Another v Zanbuild Construction (Pty) Ltd & another* 2011(5) SA 528 (SCA) para 13.



amount") upon receipt by the guarantor of your demand in writing which you may make if:

- 1.1 the Subcontractor has breached the subcontract or an event entitling the Contractor to terminate the Subcontract has occurred resulting in the cancellation of the Subcontract; and
- 1.2 the Subcontractor has failed to repay the advance payment in accordance with the conditions of the Subcontract.
2. This guarantee shall become effective upon receipt of the advance payment or any portion thereof by the Subcontractor in terms of the Subcontract. Such guaranteed amount shall be reduced by the amounts of the Advance Payment repaid to the Contractor or as deducted from payment certificates from time to time.
3. Any demand for payment must:
 - 3.1 contain your signature(s) which must be authenticated by your bankers or by a notary public; and
 - 3.2 have attached to it all payment certificates together with all recovery statements issued to the Subcontractor in terms of and in consequence of the Subcontract; and
 - 3.3 the authenticated demand and certificates must be received by us at this office on or before the Expiry Date of the guarantee."



- [14] It is clear from the wording of the Advance Payment Guarantee that it is a conditional bond and the compliance thereof is subject to the terms of the conditions. However, that is not the case with the Performance Guarantee. The stark facts which militate against appellant's submission and the prospects of success on appeal are: -

14.1 *the applicant's liability to the respondent emanates from the Indemnity which does not depend on the underlying contract. The applicant indemnified and kept the respondent indemnified and held harmless from and against all and any claim, losses, demands, liabilities, costs and expenses of whatsoever nature;*

14.2 *further and in terms of the Indemnity, the applicant undertook to pay the respondent on demand (my emphasis) any money the respondent may be called upon to pay under the Guarantee whether or not the applicant admits the validity of such claims against the respondent under the Guarantee. (my emphasis)*

- [15] I therefore do not agree with appellant's contention that the respondent was not obliged to pay because the terms of the Advance Performance Guarantee were not met.

- [16] The Advance Payment Guarantee further provides for the payment of the amount of R6, 500, 000.00 upon receipt by the respondent of a demand in writing under the circumstances where:

(i) *the Subcontractor (Wameschi) has breached the subcontract or an event entitling the Contractor to terminate the Subcontract has*



occurred resulting in the cancellation of the Subcontract..." (my emphasis).

- [17] The respondent received a written demand⁸ from the contractor which mentioned that Wameschi was in breach of the underlying contract and further that it was under liquidation. Wameschi was eventually placed under final winding up⁹. These facts were not disputed by the appellant. It was argued by the respondent that having received a written demand under these circumstances it was obligated to honor the Advance Payment Guarantee and the Performance Guarantee. I am inclined to agree with the submission by the respondent more so that, in addition, the written demand also declares that the contract has been terminated, therefore, the respondent cannot refuse to pay.
- [18] In my view the other formalities contained in the guarantee which require that the signature should be authenticated, that all payment certificates together with all recovery statements should be attached to the demand and that the authenticated demand and certificates must be received by appellant, presume that the contract would be carried to its finality which is not the case herein.
- [19] I am persuaded that the respondent acted appropriately by honoring the Advance Payment Guarantee and the Performance Guarantee because the prevailing circumstances entitled the contractor to invoke the provisions of the Advance Payment Guarantee and to cancel the agreement.

⁸ Caseline 006 - 60

⁹ Caseline 006 – 24, Court order by Swanepoel AJ (as he then was)



[20] Having regard to these prevailing circumstances and the findings I already made, I am of the view that the prospects of success, if any, are not good on appeal; additionally, the court was not referred to a particular set of circumstances to demonstrate that there are compelling reasons why the appeal should be heard.

[21] I therefore make the following order:

- (i) The application for leave to appeal is dismissed with costs inclusive Counsel's fees.



NKOSI AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of Hearing : 4 November 2024

Date Delivered : 22 November 2024

Appearances:

For the Appellant

: Adv. APJ Els S.C

Instructed by;

Eugene Beyers Attorneys

Email

: e.beyersproks@gmail.com



For the Respondent

: Adv. K Mitchell

Instructed by;

Moll Quibell and Associates

Email

: daniel@mqlaw.co.za; zak@mqlaw.co.za;
and fellon@mqlaw.co.za

This Judgment has been delivered by uploading it to the Case Lines digital data base of Gauteng Division, Pretoria and by email to the attorneys of record of the parties. The deemed date for the delivery is 22 November 2024.