

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2020/41361**

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

9 DECEMBER 2024

DATE

In the matter between:

**HOLLARD INSURANCE COMPANY
LIMITED**

Applicant

and

GAZ FUEL (PTY) LTD

First Respondent

MOHAMMED ZAIN VALLEE

Second Respondent

JUDGMENT

MODIBA, J

Introduction

- [1] This is an opposed application in which the applicant seeks monetary judgment against the respondents in the amount of R5,000,000.00, interest a tempore

more and costs on the attorney and client scale. Its cause of action arises from a deed of indemnity the first respondent, represented by the second respondent, signed, and executed in its favour on or about 22 August 2019 and a suretyship the second respondent signed and executed in its favour on the same date.

- [2] The terms of these instruments are common cause between the parties. The applicant relies on the following material, express, alternatively implied, further alternatively tacit terms of the indemnity:

2.1 The applicant agreed to, at the written request of the first respondent, from time to time to execute or procure the execution of guarantees on behalf of the first respondent or any subsidiary associated company or companies, the entity or person mentioned in such written request shall be regarded as being incorporated therein.

2.2 The first respondent would indemnify the Applicant against all claims, liabilities, costs, expenses, damage and/or losses of whatsoever nature sustained or incurred by the applicant in consequence of having executed or procured any such guarantee, including legal costs, together with interest thereon at the prime overdraft rate of Absa Bank Limited plus 2%.

2.3 The first respondent further undertook and agreed to pay to the applicant, on first written demand, any sum or sums of money which the applicant may be called upon to pay under any guarantee irrespective of the applicant having at such date made such payment *and whether or not the first respondent admits the validity of such claims against the validity of such demand against the applicant under the guarantee.* (Emphasis added)

2.4 Any settlement or claim against the applicant, the vouchers or other evidence showing evidence of loss, payment or expense are *prima facie* evidence of the liability of the first respondent and shall be sufficient for the purposes of claiming provisional sentence against the first respondent.

- [3] The applicant alleges the following material, express, alternatively implied, further alternatively tacit terms of the Suretyship on which it relies:-

3.1 The second respondent bound himself as surety and co-principal debtor jointly and severally with the first respondent, in solidum for the due payment by the first respondent to the applicant, on demand, any amounts which the first respondent may be liable to pay the applicant under the Indemnity and to indemnify the applicant against and any claims, losses, demands, liabilities, costs and expenses of whatsoever nature which the applicant may sustain or incur by reason or in consequence of having executed or thereafter executing any guarantees.

3.2 The second respondent further interposed and bound himself as surety and co-principal debtor jointly and severally with the first respondent for the due payment by the first respondent to the applicant of all amounts which the first respondent may be liable to pay the applicant under the Indemnities.

3.3 The second respondent further agreed to keep the applicant indemnified and hold it harmless from any claim, loss, demand, liability, costs and expenses of whatsoever nature, including legal costs as between attorney and client which it may sustain in consequence of having executed any guarantee on behalf of the first respondent.

[4] On or about the 19th of September 2019, the first respondent represented by the second respondent applied for a guarantee from the applicant to be issued in the name of Fuelex (Pty) Ltd in favour of Independent Petroleum Group Limited (IPG) in the amount of R5 000 000.00. Subsequently, the applicant issued guarantee number EFP/EBGS P/000159536#1 as requested for and on behalf of the first respondent for the due obligations of Fuelex (Pty) Ltd in favour of IPG.

[5] On or about the 16th of April 2020, the applicant received a written demand for payment from IPG under the said guarantee alleging failure by Fuelex to honour its commitment in terms of a credit agreement. In terms of the written demand, the applicant was called upon to make payment of an amount of R5 000 000.00 to IPG being the amount overdue and payable by Feulex to IPD under the credit agreement. On 20 April 2020, the applicant honoured this demand as obliged under the guarantee.

- [6] Subsequently, the applicant demanded payment from the second respondent in the amount of R5,000,000 in terms of the suretyship. The applicant seeks the order referenced in paragraph 1 of the judgment as the second respondent has failed to meet its demand.
- [7] The second respondent's basis for opposition is that the first respondent is not indebted to IPG and has no relationship with it. He had, prior to the guarantee being issued to IPG, enquired from the Applicant's Shaheel Jawair, who assured him that should IPG call for payment in terms of the guarantee, the applicant would only make payment upon written confirmation by the first respondent, confirming its indebtedness to Fuelex in the amount of the guarantee. It was on this basis that the respondents consented to the guarantee being issued in favour of IPG.
- [8] The respondents deny that on 16 April 2020, the first respondent was indebted to Fuelex in the amount of R5,000,000.00. They allege that Fuelex owes the first respondent an amount of R7,000,000 in respect of a refund for fuel levies. They further allege that when the applicant notified the respondents that they had received a claim under the guarantee, they informed Shaheel Jawair not to honour the guarantee as Fuelex was indebted to the first respondent in the amount of R7,000,000. Notwithstanding this requested, as well as Shaheel Jawair's earlier undertaking that the applicant would only make payment upon written confirmation by the first respondent, confirming its indebtedness to Fuelex in the amount of the guarantee, the applicant made payment to IPG in terms of the guarantee. The respondents accuse the applicant of colluding with Fuelex with the intention of defrauding or prejudicing the first respondent. Alternatively, they accuse the applicant of acting negligently when it honoured the guarantee under circumstances where the second respondent had informed Shaheel Jawair that Fuelex is indebted to the first respondent in an amount more than the guarantee.
- [9] The applicant denies that Shaheel Jawair provided any assurance to the second respondent as alleged by the respondent. It contends that such an agreement would be in direct conflict with the purpose of the guarantee and in direct conflict with the terms of the Indemnity and Deed of Suretyship. It further contends that

the respondents' allegations in this regard are an afterthought, deliberately designed to avoid its liability towards the applicant.

[10] The applicant has also provided a version regarding liabilities between the first respondent and Fuelex in respect of the first respondent's trading and customs and duties account. I do not deem it necessary to delve into this version as it is irrelevant to the issues that stand to be determined in this application. As the applicant correctly points out, it is not party to any agreement between the respondents and Fuelex. Any dispute between these parties is of no consequence to it and must be resolved between them.

[11] The respondents' grounds of opposition fail for the reasons set out below:

11.1 the guarantee was issued at the first respondent's written request in favour of IPG. IPG has demanded payment under the guarantee. The applicant duly made payment to IPG in terms of the guarantee. The applicant has demanded payment from the respondents under the Indemnity and the Deed of Suretyship. The respondents are obliged to pay the demanded amount to the applicant. It is irrelevant that they dispute the validity of the underlying claim by IPG.¹

11.2 the Indemnity and the Deed of Suretyship include non-variation clauses. These clauses render the alleged oral agreement between the second respondent and Jawair invalid and unenforceable.

11.3 the terms of the alleged oral agreement conflict with the terms of the guarantee, the Indemnity and the Suretyship, are far-fetched and against business efficacy.

11.4 the respondents baldly allege collusion between the applicant and Fuelex intended to defraud or cause the first respondent prejudice. The alleged fraud is not properly pleaded because no particularity is set out. It is also based on the second respondent's say so and not supported by

¹ *Loomcraft Fabrics CC v Nedbank Ltd* 1996 (1) SA 812 (A) at 816G – 817A and *FirstRand Bank Ltd v Brera Investments CC* 2013 (5) SA 556 (SCA) at para 11.

any evidence.² There respondents have not sufficiently made out a case for such a finding.

11.5 The respondent's allegation that the applicant acted negligently when it honoured the guarantee is devoid of any merit given the nature of the guarantee as referenced in paragraph 11.1 of this judgment.

[12] For all the reasons set out above, the applicant's claim falls to succeed. The following order issues:

Order

Judgement against the first and second respondent is granted jointly and severally, the one paying the other to be absolved for:

1.1 Payment of an amount of R5, 000, 000.00 (five million rand);

1.2 Interest on the above amount at the prime overdraft rate of Absa Bank Limited, plus 2% from 20 April 2020 to repayment thereof;

1.3 Costs of suit on the attorney and client scale.



L.T. MODIBA
JUDGE OF THE HIGH COURT
JOHANNESBURG

² See *Courtney-Clarke v Bassingthwaighe* 1991 (1) SA 684 (Nm) at 689 and *Gilbey Distillers & Vintners (Pty) Ltd v Morris* NO 1990 (2) SA 217 (SE).

Appearances

For the Applicant:

AN Kruger

Instructed by Moll Quibbell and
Associates

For the Respondent:

E Coleman

Instructed by Zaf Khan Attorneys

Date of hearing:

16 October 2024

Date of judgment:

10 December 2024

