REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/28447

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SIGNATURE

31.03.2017
DATE

In the matter between:

HOLLARD INSURANCE COMPANY LIMITED **Applicant**

and

DU TOIT, ROEDOLF **First Respondent**

DU TOIT, YOLANDE **Second Respondent**

JUDGEMENT

Windell J:

INTRODUCTION

[1] This is an application for monetary judgment based on an indemnity and suretyship.

[2] The application is against the first and second respondents, the sureties, jointly and severally, the one paying the other to be absolved, for payment of the amount of R4,942,022.37 together with interest on the aforesaid amount calculated at the rate of 11.25% from 20 July 2015 to date of final payment.

THE DEED OF INDEMNITY

[3] It is common cause that Msweli Industrial Projects CC ("Msweli") executed a Deed of Indemnity on 21 February 2011 in terms of which it undertook to indemnify Etana Insurance Co Ltd ("Etana") against any liability that Etana may occur arising from any guarantee issued by Etana at the instance and request of Msweli.

[4] In terms of the Deed of Indemnity, Msweli indemnified Etana, and agreed to keep Etana indemnified, and hold Etana harmless from, and against all and any claims, losses, demands, liabilities, costs and expenses of whatsoever nature, (including legal costs as between attorney and client and interest), which Etana may sustain or incur under or by reason or in consequence of having executed or procured any guarantee.

[5] In terms of clause 3 of the Indemnity, Msweli undertook to pay Etana immediately upon Etana's first written demand any sum of money which Etana may be called upon to pay under any guarantee whether or not Etana shall at such date have made such payment and whether or not Msweli admitted the validity of such claim against Etana in terms of the guarantee.

[6] In terms of clause 21 of the Indemnity, Etana will bear no obligation to resist or defend any claim in terms of the guarantee.

[7] On 21 February 2011, the first and second respondents undertook and bound themselves, both as indemnitors with a principal liability, as well as surieties and co-principal debtors, jointly and severally with Msweli, in respect of any indebtedness of Msweli towards Etana, arising from the indemnity furnished by Msweli to Etana.

[8] On 18 February 2014, Msweli executed a further Counter Indemnity, in favour of the applicant, the terms of which are precisely the same as the Counter Indemnity executed in favour of Etana and the respondents executed a Deed of Suretyship and Indemnity, in favour of the applicant, on precisely the same terms and conditions as the Deed of Suretyship and Indemnity executed in favour of Etana.

TRANSFER OF BUSINESS

[9] On 24 October 2013 Etana and the Applicant, entered into a written agreement for the transfer of the business of Etana to Hollard in terms of Section 36 of the Short Term Insurance Act, 53 of 1998. In compliance with Section 36(1) read with Section 37 of the Short Term Insurance Act, the transfer of the entire business of Etana to Hollard in accordance with the Transfer Agreement was duly approved by the Registrar.

[10] Hollard assumed the risk of, and became entitled to the benefit of the business of Etana with effect from 1 January 2014. Hollard became entitled to exercise the rights of Etana under the Deed of Indemnity executed in favour of Etana, and the Deeds of Indemnity and Suretyship executed in favour of Etana by the respondents, by virtue of Hollard, as the cessionary of the rights of Etana under the Deed of Indemnity, having acquired the rights of Etana against the respondents.

THE PERFORMANCE GUARANTEE

[11] On 23rd May 2013, at the instance and request of Msweli, Etana as it was entitled and obliged to do, issued a Performance Guarantee in favour of Group Five Construction (Pty) Ltd ("Group Five").

[12] On 7 July 2015, Etana received a demand from Group Five demanding payment in accordance with the Performance Guarantee in the amount of R4, 942,022.37. In accordance with the provisions of the Transfer Agreement, the demand for payment by Group Five was also delivered to the applicant. It is common cause that payment was made by the applicant to Group Five on 22 July 2015.

[13] On or about 8 July 2015, written demands were addressed to the first and second respondents in terms of the Deeds of Indemnity and Suretyships.

COMMON CAUSE FACTS

[14] It is common cause that the construction contract between Msweli and Group Five was terminated by Group Five on 7 May 2015. There is however a dispute between Group Five and Msweli as to how it was terminated.

[15] It is common cause that the bond will only lapse on occurrence of the events referred to in Clause 4 of the guarantee. Clause 4 of the guarantee reads as follows:

> *"4.1 the date that the Surety receives a notice from the Employer stating that the last Defects Certificate has been issued, that all amounts due from the Contractor as certified in terms of the subcontract have been received in terms of the subcontract have been received by the Employer and that the Contractor has fulfilled all his obligations under*

the contract; or

"4.2 the date that the Surety issues a replacement Performance Bond for such lesser or higher amount as may be required by the Employer."

[16] Clause 6 of the guarantee stipulates that: "*The amount of the bond shall be payable to the Employer upon the Employer's first written demand and no later than 7 days following the submission to the Surety of a certificate signed by the Employer stating the amount of the Employer's losses, damages and expenses incurred as a result of the non-performance aforesaid. The signed certificate shall be deemed to be conclusive proof of the extent of the Employer's loss, damage and expenses.*"

[17] The applicant was therefore obliged to pay under the guarantee upon Group Five's written demand, accompanied by a certificate signed by Group Five stating the amount of its losses, damages and expenses incurred as a result of the non-performance.

THE DEFENCE

[18] The respondents deny their liability as sureties on the basis that payment was not made under a valid, enduring performance guarantee.

[19] It is the respondent's view that the construction contract between Msweli and Group Five was terminated as a result of a deliberate repudiation of the contract by Group Five. As such, so it is argued, the applicant should not have made payment to Group Five, and consequently the respondents are not obliged to repay the applicant. In their answering affidavit the respondents explain it as follows:

"Group Five frustrated the lapsing of the performance guarantee in that it deliberately repudiated the contract: it refused, inter alia, to accept arranged measurements of work done by Msweli and make payment of the amounts owing to Msweli. The certificate amount claimed is, with respect wholly incorrect – the fact is that Group Five owes Msweli. I have been advised that the latter fact is not a defence available to Hollard or to the sureties hence I do not demonstrate this. It does, however, reflect on the context."

[20] The respondents continue and state as follows:

"I do not say that the works were completed by July 2015 when the demand was made on Hollard (indeed, in faimess, the first demand on Etana for a larger amount was made in April 2015). What I say is that Group Five repudiated the agreement with Msweli by persisting in not paying it its dues, disputing Msweli's claims and out-litigating Msweli in adjudications adverse to it. I annex an extract of the initial completion date contemplated and the defects period, copy marked "RD4" (from Msweli / Group 5 contract). As sureties we are not entitled to raise the actual state of affairs and the conduct of Group Five in so far as this affects the validity and indeed the duration of the guarantee. It suffices to say that there are deep and abiding disputes between Group Five Msweli."

[21] It is further contended that the performance guarantee was only valid until the dates in clause 4.1 and it was not intended to be a guarantee in perpetuity. The respondents therefore submit that the doctrine of fictional fulfilment is applicable and

therefore the guarantee had lapsed and payment under it could not be made to Group Five.

[22] It is however not disputed that it was Msweli that chose to tie the duration of the guarantee to factual issues of performance, as opposed to a date. Etana issued the guarantee, at the special instance and request of Msweli. The wording of the guarantee was as a result of the requirements of Group Five, as requested by Msweli.

CONCLUSION

[23] The respondents admit the execution of the various deeds of indemnity, the counter indemnity and suretyships, the issuance of the performance bond, the demand made by Group Five, and the payment thereof.

[24] The parties are further in agreement that the bond only lapses on occurrence of the events referred to in Clause 4 of the guarantee. The applicant has never issued a replacement Performance Bond in terms of clause 4.2. Consequently, the bond could only have lapsed if the following requirements in clause 4.1 have been fulfilled:

(a) the applicant must have received a notice from the employer stating that the last Defects Certificate had been issued;

(b) all amounts to and from the contractor as certified in terms of the sub-contract had been received by the employer; and

(c) that the contractor had fulfilled all its obligation under the contract.

[25] It is common cause that none of the requirements in clause 4.1 have been fulfilled. The contract was terminated prior to completion. The respondents admit that

the works were not completed by July 2015 and it is clear that Msweli did not comply with all its contractual obligations. The bond only lapses when Msweli complies with all its contractual obligations. The result is that the guarantee has not lapsed. Counsel for respondent submitted that the applicant should have, under these circumstances, investigated and made enquiries, before paying on the demand. If the applicant made enquiries it would have concluded Group 5 deliberately repudiated the contract and that the doctrine of fictional fulfilment is therefore applicable and as a result the guarantee had lapsed.

[26] Counsel for the respondent referred the court to *Van Heerden v Hermann* [1], *and Du Plessis NO and Another v Goldco Motor & Cycle Supplies (Pty) Ltd*[2], in support of the contentions on behalf of the respondents. Both these matters involved actions dealing with factual disputes between contracting parties. This necessarily entails that a trial court has to make a factual finding of *"dolus"* on the part of one of the contracting parties and a finding that the defaulting party prevented the other from performing a term of a contract upon which the performance of which payment depends. The facts of these matters are clearly distinguishable from the facts and circumstances *in casu,* and cannot be applied to a guarantee.

[27] The dispute between Msweli and Group Five regarding how the contract was terminated has no effect on the applicant's legal obligation to make payment in terms of the guarantee. The counter Indemnity and the deed of suretyship make it clear that any dispute regarding whether the applicant should or should not have made payment is not a defence available to the respondents.

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[1] 1953 (3) SA 180 (T)
[2] 2009 (6) SA 617 (SCA)

[28] There was no obligation on the applicant to make any further enquiries into the relationship between Msweli and Group Five. Group Five disputes that it deliberately repudiated the contract. The doctrine of fictional fulfilment is a legal conclusion, made by a competent court after considering all the evidence and facts placed before. It cannot be expected that a guarantor should first interrogate both contracting parties, obtain legal advice, and then make a decision as to who of the two parties was the guilty party and whether the doctrine applies. This will undoubtedly mean that the applicant involves itself with the dispute between the parties which both parties agree it is not entitled to.

[29] Counsel for the applicant referred the court to the matter of *Malebatsi v AEGIS Insurance Company Limited*[3] and *AEGIS Insurance Co (Pty) Ltd v Smith*[4]. *Malebatsi* dealt with the relationship between an insurance company and a contractor (based on the issuance of a performance guarantee and counter indemnity). The court held as follows:

> "...*The counter indemnity is a contract between appellant [contractor] respondent [insurance company]. The relevant portions thereof are set out above. They define appellant's obligations to respondent. They set out, firstly, the appellant undertakes to pay to respondent. Whatever the latter is called upon to pay under the performance guarantee. This, he has to pay whether or not respondent has made payment, and, secondly, the evidence shows payment by respondent shall be prima facie evidence of balance liability to respondent.*"

[3] AD4/92, dated 7 August 1992
[4] (unreported case number 12380/89; CPD)

[30] In *AEGIS Insurance Co,* the court dealt with a counter indemnity and a suretyship, and in doing so the court held as follows:

> *"In any event, as far as concerns these various objections, the wording of the performance guarantee an account indemnity is clear and provides that once applicant was called upon by the owner to make payment in terms of the guarantee, applicant became entitled to reimbursement from the contractor and also from respondents. This clause 2 of the performance guarantee requires an obligates applicant to make payment to the owner on demand and account indemnity obligates the contractor, and accordingly respondents as sureties, to pay to applicant on demand any sums which applicant is called upon to pay the guarantees, whether or not the applicant has made payment and whether or not the applicant has made payment and whether or not the contractor and admits the validity of the claim against applicant under the guarantees. This being so, the liability of respondents is established, and any factual disputes such are averred by the respondents are irrelevant".*

[31] The demand complies with Clause 6, and as such, the applicant was obliged to pay the amount to Group Five. The obligation to pay was not conditional in any way and as such the performance bond constitutes an "on-demand" guarantee in the hands of Group Five. The demand provides conclusive evidence that payment was due.

[32] It is trite that the machinery and commitments of banks must be allowed to be honoured, free from interference by the courts. Otherwise trust in international commerce could be irreparably damaged[5].The applicant issued the performance bond at the instance and request of Msweli. Group Five demanded payment under the guarantee and the applicant paid the amount under the bond as it was obliged to do so. I am satisfied that the applicant is entitled to be indemnified to the extent of such amount, and by virtue of the fact that the respondents are sureties and co-principle debtors (together with Msweli), the liability of the respondents have been established.

[33] In the result, the following order is made against the first and second respondents, jointly and severally, the one paying the other to be absolved for:

1. Payment of the amount of R4,942,022.37.
2. Interest on the amount of R4,942,022.37 at the rate of 11.25% per annum calculated from 22 July 2015 to date of final payment.
3. Costs of the ~~action~~ applicant on the scale as between attorney and client.

L WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

[5] The dictum in *RD Harbottle (Mercantile) Ltd & Another v National Westminister Bank Ltd & Others* 1977 2 All ER 862 (QB) approved in *Loomcraft Fabrics CC v Nedbank & Another* 1996 (1) SA 812 (A)

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Date of hearing:	13 March 2017
Date of judgement:	31 March 2017