

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

CASE NO: 2022/009190

(1) Reportable: No

(2) Of interest to other Judges: No

(3) Revised: No

Date: 18/08/2022

Δ Maier-Frawley

In the matter between:

MAZIYA GENERAL SERVICES CC

Applicant

and

LEROKO BROKERS (PTY) LTD

First Respondent

**VEOLIA WATER SOLUTIONS &
TECHNOLOGIES SOUTH AFRICA (PTY) LTD**

Second Respondent

VEOLIA SERVICES SOUTHERN AFRICA (PTY) LTD

Third Respondent

J U D G M E N T

MAIER-FRAWLEY J:

Introduction

1. The applicant brought an urgent application seeking to interdict the implementation of a demand made by the named beneficiary under a written performance guarantee issued by the first respondent (the insurer/guarantor) in favour of Veolia Water Solutions & Technologies South Africa (Pty) Ltd (the named beneficiary) at the instance and request of the applicant (the principal). ¹

¹ The interdict sought by the applicant is aimed at restraining the first respondent (guarantor/insurer) from making payment under the bond and to restrain the beneficiary from enforcing its demand against the guarantor under the bond.

2. Although the second and third respondents were cited as separate parties in the application, on the unrefuted facts, they are one and the same entity, the third respondent having changed its name from that of 'Veolia Water Solutions & Technologies South Africa (Pty) Ltd' to that of 'Veolia Services Southern Africa (Pty) (Ltd)' on 6 January 2021, which name change was duly registered and is reflected in the company records of CIPC. For convenience and as dictated by the context, I will refer to the second and third respondents as 'Veolia' in the judgment.
3. The first respondent (Guarantor) did not oppose the application or participate in the hearing of the matter.
4. The central dispute between the applicant and Veolia relates to whether or not the guarantee in question is to be construed as an on-demand guarantee or a conditional guarantee. If it is the former, the applicant accepts that the guarantee has an existence independent from the underlying obligations of a debtor, as the guarantee constitutes an independent and autonomous contract between the Guarantor and the Beneficiary, and, subject to this court finding that Veolia complied with the terms of the guarantee, it must lose. If the latter, the question that arises is whether the terms of the guarantee required the Veolia to establish the applicant's liability to it under the sub-contract concluded between those parties and if so, whether Veolia's demand complied with the terms of the bond.
5. The applicant contends that since Veolia failed to demonstrate the applicant's liability under their sub-contract when demand was made, the insurer/guarantor is not liable to make payment under the guarantee. Further, when the demand was made, it did not comply with the terms of

the guarantee and the Guarantor is therefore not liable to make payment demanded thereunder.

6. The applicant contends for an interpretation that the guarantee is a conditional or accessory bond which is linked to the sub-contract in a manner that is more akin to a suretyship agreement, not unlike that which the court in *Zanbuild*² interpreted to be a conditional bond.³ In other words, the applicant asserts that liability under the guarantee is conditional on non-performance by the applicant of its obligations to Veolia under the sub-contract. Thus the applicant contends that Veolia was required to do more than merely allege liability on the part of the applicant in its demand. Rather, it was required to establish liability on the part of the applicant under the sub-contract for the amount claimed in Veolia's demand.

7. Based on the interpretation contended for by the applicant, it argues that the guarantor's liability under the guarantee is limited to the extent that Veolia can demonstrate the applicant's liability to it under the relevant sub-contract. The applicant avers that demand was not properly made in accordance with the terms of the guarantee, which required of Veolia to establish the applicant's liability to it in terms of the underlying sub-contract in order for the event specified in the bond to trigger liability on the part of the Guarantor. Since Veolia failed to establish the applicant's liability under the sub-contract when demand was made, the insurer/guarantor is not liable to make payment under the guarantee and the applicant has a right to interdict payment to Veolia thereunder in order to protect its financial exposure under a written indemnity provided by it to the guarantor. In the

² *Minister of Transport and Public Works, Western Cape and Another v Zanbuild Construction (Pty) Ltd and Another* (68/2010) [2011] ZASCA 10; 2011 (5) SA 528 (SCA) (11 March 2011) ("Zanbuild").

³ Whether the applicant's contention is correct, depends *inter alia* on whether or not the terms of the guarantee considered in *Zanbuild* are not dissimilar to the terms of the guarantee in *casu*. More importantly, however, it depends on a proper construction of the bond.

event that the guarantor were to pay the sum demanded by Veolia under the guarantee, the applicant would be liable to make good the insurer's losses under the provisions of a written indemnity executed by the applicant in favour of the first respondent, hence, so it was contended, it has the necessary *locus standi* to interdict payment at this juncture.

8. The respondent, on the other hand, contends for an interpretation that the guarantee is by its express terms, an on-demand guarantee, which is wholly independent from the underlying sub-contract, being an autonomous contract between the guarantor (first respondent) and the beneficiary (Veolia), with the consequence that the applicant lacks *locus standi* to interfere in that relationship as it seeks to do in these proceedings. However, in the light of the indemnity put up by the applicant in its replying affidavit, the *locus standi* point was not further pursued at the hearing.

Factual matrix

9. The guarantee was issued with reference to a sub-contract entered into between the applicant and Veolia on 1 July 2021. At the time of the conclusion of the sub-contract, Veolia had already changed its name to 'Veolia Services Southern Africa (Pty) (Ltd)' and accordingly, it was described in the sub-contract by such name.
10. Veolia had been awarded a contract under Tender No. RW 01197/15 by Rand Water, a body established in terms of the Water Services Act, 1997, to construct a new chlorine building and scrubber bund at the Vereeniging Water Pumping Station for purposes of providing basic water services to the people of South Africa. Veolia was obliged to execute the project in accordance with the scope of the works as determined by Rand Water. The scope of the works required to be performed by Rand Water was reduced to

writing and appears in a document attached as annexure 'FA4' to the founding affidavit ('the Scope of Work'). Veolia is described therein by its erstwhile name, 'Veolia Water Solutions & Technologies South Africa (Pty) Ltd', with reference to contract number RW 01197/15, presumably because that is how it was described in the main agreement at the time of its conclusion.⁴

11. The Scope of Work *inter alia* included the demolition and removal of existing structures (existing ablution block), disposal of debris, site clearance, removal of trees, and the construction, installation, and execution of a 'new chlorine building and scrubber bund.'
12. Veolia sub-contracted with the applicant to perform the construction, installation and execution components of the Scope of Work in terms of the Sub-contract. The sub-contract specifically incorporated within its terms, the Scope of Work as determined by Rand Water.
13. A dispute has arisen between the applicant and Veolia concerning an alleged breach by the applicant of its obligations under the sub-contract, and the validity of Veolia's purported termination of the sub-scontract consequent upon the alleged breach. In short, the applicant alleges that Veolia's purported termination was invalid. It alleges that pursuant to the termination letter, the parties agreed to mutually terminate the sub-contract. Veolia subsequently repudiated the mutual termination agreement without justification and demanded payment of the bond without recourse to the dispute resolution processes in clause 29 of the sub-contract. The applicant alleges that on a proper construction of the bond, Veolia wished to

⁴ The contract between Rand Water and Veolia was not attached to the papers in these proceedings.

obtain limited security in the event of non-performance by the applicant under the sub-contract.

Discussion

14. A passage that has become a standard for the elucidation of the subject of interpretation of contracts, is the oft quoted extract from the case of *Endumeni*.⁵ More recently, the passage has been clarified and made clear by Unterhalter AJA in *Capitec Bank Holdings*,⁶ as follows:

“[25]... The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*⁷ offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, ‘[t]he inevitable point of departure is the language of the provision itself’.⁸

[26]... *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [\[2012\] ZASCA 13](#); [\[2012\] 2 All SA 262](#) (SCA); [2012 \(4\) SA 593](#) (SCA) (*Endumeni*) at para 18.

⁶ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022* (1) SA 100 (SCA) at paras 25, 26 & 51.

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [\[2012\] ZASCA 13](#); [\[2012\] 2 All SA 262](#) (SCA); [2012 \(4\) SA 593](#) (SCA) (*Endumeni*) para 18.

⁸ *Endumeni*, par 18.

[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text." (footnotes included) (emphasis added)

15. The guarantee in question reads, in relevant part, as follows:

"THIS BOND is dated 22nd day of February 2022.

BETWEEN:

1. Leroko Brokers (Pty) Ltd... (the "Guarantor"); and
2. Veolia Water solutions & Technologies South Africa (Pty) LTD, a company incorporated in South Africa with its registered office at Golf View Office Park, 13 Pressburg Road, Founders View, Modderfontein, 1609, Gauteng (the "Beneficiary");

WHEREAS:

- A. By a contract, Contract Agreement No. 21000104 HD 311 (the "Contract")...between the Beneficiary and the contractor, Mayeza General Services CC (the "Principle") and
- B. By a contract, Contract Agreement No. 21000104 HD 311 entered into between the Beneficiary and the Client, back to back with the Beneficiary/Principle Agreement, and
- C. The Principle has agreed with the Beneficiary to carry out and complete certain work/services and perform and undertake the other risks and obligations to be performed and undertaken by the Principle as set out in the Contract (the "Works") upon and subject to the terms and conditions therein contained.
- D. The Guarantor has agreed, at the request of the Principle, to enter into **this on-demand Bond** with the Beneficiary

NOW THIS DEED WITNESSES as follows:

1. ...

2. The Guarantor's liability under this Bond is principal in nature and is not subject to the Contract or any other agreement, shall not be reduced or in any way be affected by any alteration of the terms of the Contract, or any other arrangements made between the Principal, Client and/or Beneficiary.
3. The Guarantor shall not determine the validity of a demand made under this Bond or the correctness of the amount demanded nor shall it become party to any claim or dispute against the Beneficiary of any nature or alleged by any party.
4. The Guarantor's obligation to make payments under this Bond shall arise on receipt of a demand made in accordance with the provisions of the Bond, without any further proof or condition and without any right of set-off or counterclaim, and the Guarantor shall not be required or permitted to make any other investigation or enquiry.
5. The Guarantor hereby irrevocably and unconditionally undertakes to pay the Beneficiary within three business days following that on which it receives a demand from Beneficiary in accordance with Clause 6 below.
6. The Beneficiary may make one or more demands hereunder...on any business day, during normal banking hours at the Guarantor's Johannesburg office (or such other office of the Guarantor in Johannesburg as the Guarantor may from time to time notify the Beneficiary) and/or a copy emailed to the Guarantor's to the following email address lee-anne@lerokobrokers.co.za.

Each demand shall:

- a. be written on the Beneficiary's letterhead;
- b. signed by a Beneficiary director (whose authority, qualification or appointment need not be proved);
- c. state that the Principle is in breach of its obligations under the terms of the Contract;
- d. state the Beneficiary's bank account details;
- e. state an amount equal to the lesser of:
 - i. the amount specified in such demand; or

- ii. R1 110 473,97 (One Million, one hundred and Ten Thousand, Four Hundred and Seventy Three Rand and Ninety Seven Cents) (the “Bond Amount”) less the aggregate of all previous payments made under this bond.

...”

(emphasis added)

16. The applicant avers that Veolia did not comply with the terms of the guarantee, firstly, because it made demand in the name of ‘Veolia Water Solutions & Technologies South Africa (Pty) Ltd’, being the named beneficiary in the guarantee, whilst knowing that an entity by that name did not exist as Veolia was trading as ‘Veolia Services Southern Africa (Pty) (Ltd)’ at the time, and secondly, because the demand was not written on the named beneficiary’s letterhead, i.e., that of Veolia Water Solutions & Technologies South Africa (Pty) Ltd, but rather on the letterhead of Veolia Services Southern Africa (Pty) (Ltd).
17. In terms of the sub-contract, the applicant undertook to perform certain works on behalf of Veolia in accordance with the Scope of Work as determined by Rand Water under the main construction agreement that was concluded between Rand Water and Veolia –therein described by its old name – ‘Veolia Water Solutions & Technologies South Africa (Pty) Ltd.’ The sub-contract was entered into between the applicant and Veolia - therein described by its new name – ‘Veolia Services Southern Africa (Pty) (Ltd).’ When sub-contracting to perform the works required by Rand Water on behalf of Veolia, the applicant would thus have been alerted to Veolia’s name change, given that Veolia’s old name appeared in Rand Water’s Scope of Work document, which document was incorporated in the sub-contract concluded with Veolia under its new name with such document referring to Veolia by its old name. The applicant could not have laboured under any misapprehension that it was dealing with one and the same entity that Rand

Water had contracted with under the main agreement, for purposes of performing the works in terms of the sub-contract as mandated by Rand Water under the main agreement.

18. The guarantee records that the applicant requested the Guarantor '*to enter into **this on-demand Bond with the Beneficiary.***'⁹ The guarantee is dated 22 February 22, by which time the named beneficiary had already undergone a name change. Yet the beneficiary was described in the guarantee by its old name. The papers are silent as to whether the applicant or Veolia had provided the details of the beneficiary's name to the Guarantor. Presumably Veolia's old name was inserted in the guarantee because that is the name reflected in the 'Scope of Work' document pertaining to both the main agreement and the sub-contract, which works the applicant undertook to perform for the client, i.e., Rand Water, on Veolia's behalf in terms of the sub-contract.¹⁰
19. Veolia made demand under the guarantee in its old name, ostensibly in conformity with the provisions of the guarantee, albeit using a company letterhead that reflected the particulars of its new name 'Veolia Services Southern Africa (Pty) Ltd, Golf View Office Park, 13 Pressburg Road, Founders Viw, Modderfontein, 1609', being the same address of the beneficiary described in second paragraph of the guarantee under the caption 'BETWEEN'.
20. Veolia submitted a demand under the guarantee, in which it stated as follows:

"DEMAND ON GUARANTEE NUMBER: dem20220304/001

⁹ Bold font and italics are own emphasis.

¹⁰ The guarantee refers to both the main agreement and sub-contract in paragraphs [A] and [B] thereof.

1. Veolia Water Solutions & Technologies South Africa (Pty) Ltd, the Beneficiary herewith makes a demand on Bond, bond reference Guarantee Number DEM20220304/001.
 2. The Principle, Maziya General Services CC is in breach of its obligations under the terms of the Contract.
 3. Payment should be made into the Beneficiary's bank account details, as follows:
 Bank: Standard Charter Bank
 Address of Bank: 2nd Floor, 115 West Street, Sandton
 Account Name: VEOLIA SERVICES SOUTHERN AFRICA (PTY) LTD
 Branch code: 730020
 Swift Address: SCBLZAJJ
 Branch: Johannesburg Branch
 ...
 4. The amount is R1,110,473.97 (One million, one hundred and ten thousand, four hundred and seventy three Rand and ninety seven Cents).
 5. Payment, in accordance with bond paragraph no.5 shall be made within three business days following receipt of this demand. Interest on overdue payment shall accrue as provided for in bond paragraph no.9."
21. It is by now well established that whether or not there has been compliance with the terms of the guarantee is a matter of interpretation by the court.¹¹ The real issue, which involves an interpretation of this particular guarantee, is simply whether there was compliance by Veolia with the terms of the guarantee under circumstances where the company described as the named beneficiary in the guarantee and the company which made demand thereunder, was and remained at all material times one and the same company, albeit that such company had at some point undergone a name change. The description of the named beneficiary in the guarantee was to identify the company entitled to make demand thereunder, ostensibly to prevent fraudulent claims being made by a different entity, i.e., a company other than the company entitled to make demand thereunder, particularly since the Guarantor was not required to determine the validity of any demand made under the guarantee or to have regard to the underlying

¹¹ See: *Lombard Insurance Company Limited v Schoeman and Others* 2018 (1) SA 240 (GJ) at par 48; The judgment was upheld in its entirety on appeal. See: *Schoeman and Others v Lombard Insurance Company Limited* 2019 (5) SA 557 (SCA), more specifically, para 22.

contracts which were referred to therein, nor was it to become involved in any disputes arising between the beneficiary, client or 'principle'¹².

22. It was submitted by Veolia's counsel during oral argument that as regards the requirement in clause 6(c) of the guarantee, the applicant contends that it must be read to mean something different to what it states, which offends the basic rule of interpretation. As regards the requirements in clause 6(a) and (b), the applicant suggests that the name of the beneficiary is fixed or cast in stone. The applicant's argument in this regard makes no sense. The name of the beneficiary depicts who is entitled to claim. By way of illustration, if a degree certificate is issued in a legal representative's maiden name and such person thereafter marries and signs pleadings in his or her new married name, would he/she be committing fraud? Of course not. Behind the name is the exact same person. So in the context of the present proceedings, behind the beneficiary's name is the exact same entity with legal standing. It is thus absurd to suggest that its historic legal standing has been altered by a name change. I agree.
23. The company named as the beneficiary was Veolia Water Solutions & Technologies South Africa (Pty) Ltd, and despite its name change, it remained the very same company thereafter. There can thus be no merit in the suggestion that a different entity to that which was entitled to make demand under the guarantee, attempted to make demand. The suggestion by the applicant in its heads of argument that Veolia knowingly misrepresented the beneficiary's name 'in a failed attempt to comply with the formalities' and that it sought to gain an advantage by doing so, is contrived in the circumstances. The demand was made by the same company that the contracting parties intended would be entitled to make demand as

¹² 'Principle' appears to have been misspelt in the guarantee. The correct spelling is '*principal*'.

beneficiary. The demand was made on a letterhead of the beneficiary and was signed by a director of such beneficiary, as envisaged in clause 6(a) and (b) of the guarantee. In those circumstances there was compliance with the terms of the guarantee as provided in clause 6(a) and (b) thereof.

24. This brings me to the question whether the guarantee is to be construed as an on-demand guarantee or a conditional guarantee. The applicant contends that the language in the guarantee is demonstrative of it being conditional on the non-performance by the applicant of its obligations under the sub-contract before an entitlement to payment under the guarantee arises. Put differently, the applicant asserts that the beneficiary is first required to establish non-performance by the applicant of its obligations under the sub-contract, and hence its liability thereunder, before the beneficiary (Veolia) 'is entitled to call on the insurer to step in and render performance of the obligation or liability'.

25. The applicant contends for a construction that Veolia wished to obtain limited security in the event of non-performance by the applicant under the sub-contract. The applicant alleges that such construction is supported by paragraph 6(c) of the guarantee, 'which states that any demand under the Guarantee must allege that the applicant is in breach of its obligations under the terms of the sub-contract.' Further indicators of the bond's accessory nature, says the applicant, include the following: (i) the limit of any claim under the bond equates to 10% of the total value of the sub-contract of R9 656 295.68 (excluding value-added tax) as agreed between the parties in terms of clause 5 of the Subcontract; (ii) paragraphs A, B and C of the Guarantee expressly refer to the sub-contract concluded between Veolia and Maziya; and (iii) paragraph 1 provides that the definitions used in the sub-contract are incorporated into the terms of the Guarantee.

26. In its heads of argument, the applicant relies on the fact that clause 6(c) - which requires a statement that the applicant breached the sub-contract - is the strongest indicator that the guarantee is inextricably tied to the applicant's performance under the sub-contract. The applicant contends that the event contemplated in the bond is thus limited to the breach which must exist in fact, failing which the bondholder is to be considered as dishonest and liable to a finding of fraud. Since the applicant 'strongly disputes' that it committed a breach, the applicant seeks to conclude that Veolia has 'fraudulently attempted to exact payment.' An additional indicator of the accessory nature of the bond is based on the applicant's contention that only a single claim can be made under an on-demand guarantee. Since the guarantee in question provides for more than one claim to be made, it is in substance conditional, notwithstanding the language that suggests that the bond is payable on mere allegation of breach.
27. Aside from the fact that no authority was cited for the proposition that an on-demand guarantee permits of only a single claim, the contention is also unsustainable, as illustrated by the facts in *Lombard supra*.¹³
28. In terms of clauses 2, 3, 4 and 5 of the guarantee, the Guarantor's liability was expressly stated to be principle in nature, i.e., not accessory to the liability of the Principal (applicant), would not be affected by any agreement or arrangement made between the Client, Principal and the Beneficiary, and was payable on demand. Further, the Guarantor was not obliged to determine the validity of the demand or the correctness of the amount demanded, nor would the Guarantor become party to any claim or dispute of any nature as alleged by any party. Consistent with these provisions, the

¹³ See for example, *Lombard supra*, Cited in fn 6 above. A reading of the High Court's judgment reveals that more than one claim/demand was made under the on-demand guarantee in question in that case, which was permitted by the terms of the guarantee.

guarantor irrevocably and unconditionally undertook to pay the beneficiary within three business days following the day on which it received a demand from the beneficiary in accordance with clause 6 of the guarantee. Moreover, in paragraph D of the preamble, it is specifically recorded that the guarantor had agreed, '*at the request of the Principal, [i.e., the applicant] to enter into this **on-demand Bond***' with the beneficiary. (own emphasis)

29. The unequivocal, express terms of the guarantee cannot be wished away or ignored, as the applicant would have it. That much was made clear in *Capitec Bank Holdings, supra*. Clause 6(c) required no more than *a statement* that the applicant was in breach of its obligations under the terms of the sub-contract. That no more than an allegation to that effect was required, is not only consistent with the tenor and nature of an on-demand guarantee, but also with the fact that the guarantor was not obliged nor equipped to become involved in any evolving disputes between the parties,¹⁴ nor was it

¹⁴ In this regard, see: *Standard Bank of South Africa Ltd v Council of the Municipality of Windhoek*, 2015 JDR 2331 (NmS) at paras 23-25, [a decision quoted with approval in *Lombard supra* (which extract was not disapproved of or disagreed with on appeal by the SCA in *Schoeman supra* - quoted in fn 6 above)], where the following was said:

"[23] A banks obligation to honour a demand guarantee arises only as and when the beneficiary seeks payment in *accordance with the terms of the guarantee*. It must be borne in mind that guarantees are issued by banks to beneficiaries on specific terms mandated and approved by their clients (often referred to as 'account parties'). Although banks may generally be inclined to honour such guarantees on demand to protect their commercial reputation, those considerations are counterbalanced by the need not to compromise the rights and interests of their clients beyond the parameters of the commitments acceded to in the demand guarantee. As it is, demand guarantees, by their nature and application, impose heavy risks on account parties...(a) The autonomous nature of demand guarantees deprive them of the right to resist payment of the guarantee on grounds which would otherwise be well-founded had the demand been based on the underlying agreements – the obligation to pay demand guarantees is not even extinguished if the underlying agreement is cancelled on valid grounds...(b) In the absence of fraud, the question whether or not there has been compliance with the requirements of the demand guarantee by the beneficiary, is apparently for the bank alone to determine when the demand is made and it is not open for the account

obliged to verify the validity of the claim. The unequivocal, expressed intention of the parties, namely, the insurer and Veolia, was that the insurer had no right to venture into issues going beyond the terms of the guarantee.

30. As pointed out by the Supreme Court of Appeal in *Compass*,¹⁵ "...The very purpose of a performance bond is that the guarantor has an independent, autonomous contract with the beneficiary and that the contractual arrangements with the beneficiary and other parties are of no consequence to the guarantor." However, in para 15, the SCA went on to say that "There may be cases where what is referred to as a guarantee constitutes no more than an accessory obligation.¹⁶ However, it is the terms of the guarantee itself that will determine its nature." (Emphasis added)
31. In *Zanbuild*,¹⁷ the court held that the essential difference between on-demand bonds and conditional bonds is that '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

party to seek an interdict to restrain the bank from paying on grounds of non-compliance with the required demand...(c) the counter-indemnity sought from an account party will invariably be on wider terms than the liability of the bank under the guarantee itself...(d) The account party is financially exposed to the possibility of unfair demand or abuse of the guarantee; ...

[24] These considerations highlight the place and importance of the principle of strict compliance to demand guarantees, subject, of course, to the 'caveat that the degree of compliance required by each particular bond always depends on its true construction'. ...

[25] When faced with a demand for payment, it seems to me that a bank has a general duty towards the client on whose mandate it had issued a demand guarantee, first, to construe the guarantee and assess what the beneficiary has to do so as to make a valid demand under it and, then, to assess the demand and, if required, associated declaration in order to determine whether the beneficiary has complied with those obligations". (emphasis added)

¹⁵ *Compass Insurance Co Ltd v Hospitality Hotel developments (Pty) Ltd* 2012 (2) SA 537 (SCA) at para [14]

¹⁶ As in *Minister of Transport and Public Works, Western Cape v Zanbuild Construction (Pty) Ltd* (68/2010) [2011] ZASCA 10 ("Zanbuild").

¹⁷ Cited in fn 16 above.

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.'

32. The terms of the guarantee in *casu* are different from the terms of the guarantee considered in *Zanbuild supra*, a case on which the applicant relied for its interpretation that the guarantee in question is a conditional bond, with the applicant's counsel contending that *Zanbuild* is a case that is precisely on point with respect to the case at hand. I am, however, unable to agree with such contention. The relevant terms of the guarantee considered in *Zanbuild* appear from paragraph 18 of that judgment. Suffice it to say that the court in *Zanbuild* held that the guarantee in that matter had certain features which were more akin to the nature of a suretyship rather than a call bond, for example, the term providing the bank with a right to withdraw from the guarantee on thirty days' notice and thereby release itself from all obligations under the guarantee, whereas in the present matter, the guarantee is expressly stated to be irrevocable.
33. As was underscored by Unterhalter AJA in the *Capitec Bank Holdings* case: '*Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed.' And, as the court in *Zanbuild* made plain, '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...'
34. The applicant's argument, namely, that clause 6(c) must be read to mean that Veolia was required to do more than merely allege in its demand that the applicant was in breach of its obligations under the sub-contract, by requiring actual proof such breach, is in stark contradistinction to the terms of the guarantee, more specifically, clauses 2, 3 and 4 thereof.

35. One last point bears mention. During the course of oral argument, counsel for the applicant sought to contend that the inscription appearing at the very bottom of the last page of the guarantee and beneath the signature of the insurer's representative and the company seal of Leroko Brokers (Pty) Ltd, which states: "*Please note that a claim under this suretyship will only be honoured upon submission of the original document*" is a further pointer that the bond was conditional. This argument cannot be sustained. The inscription did not form part of the terms of the guarantee and appears to me to be template based. In any event, the use of inaccurate nomenclature does not derogate from the fact that the nature of the guarantee is determinable from its terms.
36. For all the reasons given, I conclude that the guarantee in question is an on-demand guarantee, requiring no more than a statement that the applicant was in breach of its obligations under the sub-contract in terms of clause 6(c). As this requirement and the other terms in clause 6 of the guarantee were complied with, it follows that the guarantor is obliged to make payment and that Veolia is entitled to receive payment pursuant to a demand properly made under the guarantee. The applicant has no right to interfere in this relationship. This carries the consequence that the applicant has failed to demonstrate a *prima facie* right to interdictory relief and the application must fail.
37. As regards the requirement of irreparable harm, I agree with the submissions of Veolia's counsel that this requirement for interim interdictory relief has likewise not been satisfied. Assuming for the sake of argument that the insurer ought not to pay out the amount demanded under the guarantee - in circumstances where a different entity to that which is entitled to receive

payment under the guarantee makes a demand - but does in fact pay out and thereafter seeks to enforce its rights against the applicant under the indemnity, the applicant would still be able to raise as its defence that the insurer paid out to the wrong party. In other words, if the insurer wrongly paid out to the wrong party, whatever defence that applicant believes it has would be retained, should the insurer enforce its rights under the indemnity in due course.

38. In all the circumstances, I am not persuaded that the applicant has established a case for the grant of an interim interdict. The general rule is that costs follow the result. I see no reason to depart therefrom.

39. Accordingly, the following order is granted:

ORDER:

1 The application is dismissed with costs.

**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 10 August 2022
Judgment delivered 18 August 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 18 August 2022.

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