

REPUBLIC OF SOUTH AFRICA



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

Case No: 2023-000702

- (1) REPORTABLE: No
- (2) OF INTEREST TO OTHER JUDGES: No
- (3) REVISED.

..... **8 December 2023**
SIGNATURE **DATE**

In the matter between:

THE CONSORTIUM COMPRISING:

Applicant

**K C COTTRELL CO LTD
ELB ENGINEERING SERVICES (PTY) LTD (in liquidation)
ELB EDUCATIONAL TRUST FOR BLACK SOUTH AFRICANS**

And

SANTAM LTD

1st Respondent

NGODWANA ENERGY (RF) (PTY) LTD

2nd Respondent

NEDBANK LTD c/o NEDBANK COPORATED

3rd Respondent

This order was handed down electronically by circulation to the parties' legal representatives by email on 10 November 2023 and the reasons for the order on 8 December 2023.

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] The Applicant (*the Consortium or the Contractor*) seeks an interim interdict pending the outcome of an action instituted under case number 2023-00166, interdicting and restraining the 1st Respondent (*Santam*) from making payment to the 2nd Respondent (*the Employer*) under a performance guarantee issued by Santam under number 14816 (*the Guarantee*) in favour of the Employer which Guarantee is expressed to be payable on receipt of an appropriately worded demand from the 3rd Respondent (*Nedbank*), the Employer's agent. The basis upon which the interdictory relief is sought is that the demand by Nedbank for payment of the amount of R164 163 815.10 is fraudulent in that, to the knowledge of the Employer and Nedbank, the Contractor is not indebted to the Employer in the amount of R164 163 815.10 in respect of Delay Liquidated Damages (*DLD's*).

[2] At the commencement of the proceedings there was some uncertainty about the extent of an undertaking given by Santam to the Contractor. After some debate it was established that the agreement between Santam and the Contractor is that Santam will not make payment to the Employer until finalisation of Part A of this application i.e. the interim interdict proceedings serving before me. After the hearing I reserved judgment.

[3] On 10 November 2023 I granted the following order:

- (a) The 1st Respondent [Santam] is interdicted and restrained from making payment under the Performance Guarantee No. 14816 pending the outcome of the action instituted under case number 2023-00166;
- (b) The costs are reserved for determination in the action.

[4] I undertook to provide reasons. In what follows, I provide same.

The nature of the relief and the complaint

[5] In order for an interim interdict to be granted, an applicant must establish a *prima facie* right, a well-grounded threat of irreparable harm, that the balance of convenience favours the grant of the interdict sought and that there is no alternative and effective remedy¹. These requirements are to be assessed together and are not to be judged in isolation. Ultimately, this Court must consider whether the granting of the interim interdict would be in the interests of justice.

[6] The order I was requested to make is not definitive of the parties' legal rights. The order does not determine finally whether the demand for payment of the amount of R164 163 815.10 is fraudulent in that, to the knowledge of the Employer and Nedbank, the Contractor is not indebted to the Employer in the amount of R164 163 815.10 in respect of Delay Liquidated Damages (*DLD's*). That being so, all the Contractor needs to show is a *prima facie* right, though open to some doubt ie the *Webster v Mitchell* test² and not the *Plascon-Evans*³ test.

¹ *Webster v Mitchell* 1948 (1) SA 1186 (W.L.D.) at 1189

² *ibid*

[7] The Contractor alleges that the demand under the Guarantee was made fraudulently. In other words, the Contractor's case is that Nedbank, acting on the instructions of the Employer, with knowledge of the falseness of what was represented in the demand for payment under the Guarantee misrepresented the true state of affairs.

[8] Since the Contractor has invoked what is known as the fraud exception, it follows that this Court is required to consider the facts insofar as they relate to the demand. After all, fraud is primarily a factual and not a legal matter. The basis of the demand is material to the issues in this application. Without an understanding of why the demand was made, the question of whether the demand is fraudulent cannot be entertained.

[9] It is common cause that the basis of the demand is the alleged indebtedness of the Contractor in relation to the DLD's. It is the alleged indebtedness of the Contractor in regard to the DLD's that lies at the heart of the fraud issue.

[10] It is the Contractor's case that its indebtedness in relation to the DLD's was duly paid by way of a cash payment on 20 December 2021 of R28 222 982.35 and by way of set-off or withholding of the amount of R164 163 815.10, which withholding, the Contractor says, took place in 2021 as and when it achieved a milestone. The Employer denies this set-off or withholding and says that although its Annual Financial Statements record as a fact the Contractor's version (at 3 different places in the Employer's Annual Financial Statements), this was merely an accounting entry based on incorrect facts which falls to be reversed.

³ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd*, (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984)

Legal position iro fraud and performance guarantees

[11] The legal position is succinctly summarised in *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd*⁴, where Theron JA (as she then was) held as follows:

[28] Our courts, in a long line of cases and also relying on English authorities, have strictly applied the principle that a bank faced with a valid demand in respect of a performance guarantee, is obliged to pay the beneficiary without investigation of the contractual position between the beneficiary and the principal debtor. One of the main reasons why courts are ordinarily reluctant to entertain the underlying contractual disputes between an employer and a contractor when faced with a demand based on a demand or unconditional performance guarantee, is because of the principle that to do so would undermine the efficacy of such guarantees. This court in *Loomcraft* referred to the fact that the autonomous nature of the obligation owed by the bank to the beneficiary under a letter of credit 'has been stressed by courts both in South Africa and overseas'. The learned judge referred to a number of authorities, both local and English to illustrate this point. Similarly, this court in *Lombard Insurance*, confirmed that the obligation on the part of the bank to make payment on a performance guarantee is independent of the underlying contract and whatever disputes may arise between the buyer and the seller are irrelevant as far as the bank's obligation is concerned.

[29] In my view this principle is based on sound reason. It underscores the commercial nature of performance guarantees. In determining whether payment should be made on such a guarantee, accessory obligations are of no consequence. The very purpose of the guarantee is so that the beneficiary can call up the guarantee without having to wait for the final determination of its rights in terms of accessory obligations. To find otherwise, would involve an unjustified paradigm shift and defeat the commercial purpose of performance guarantees.'

[12] The existence of fraud in demanding payment under a guarantee would excuse a Guarantor from making payment in terms thereof. In respect of the fraud exception, Theron JA extrapolated the following principles:

[17] It would be useful to briefly consider the legal position in relation to the fraud

⁴ [2014] 1 All SA 307 (SCA)

exception. It is trite that where a beneficiary who makes a call on a guarantee does so with knowledge that it is not entitled to payment, our courts will step in to protect the bank and decline enforcement of the guarantee in question. This fraud exception falls within a narrow compass and applies where:

‘ ... the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his (the seller’s) knowledge are untrue.’

[13] In *Loomcraft Fabrics CC v Nedbank Ltd*⁵ the court emphasised that fraud on the part of the beneficiary of the guarantee would have to be clearly established and, although the onus would be discharged by proof on a balance of probabilities, as in any case where fraud was alleged, it would not lightly be inferred (at 817G – H)⁶.

[14] The independence of a performance guarantee has been restated many a time and it is accepted that disputes concerning the principal agreement will be dealt with later.⁷

[15] The Employer contends that the dispute as to whether the amount of R164 163 815.10 has been set off against amounts that were to be paid for work executed does not give rise to, or support an inference of, fraud within the narrow compass referred to in *Lombard Insurance*⁸ and does not provide a defence to the call on the Guarantee.

Analysis of the facts and prima facie right

[16] On 26 October 2016, the Employer concluded a written agreement (*the Contract*) with an unincorporated joint venture collectively comprised of K C Cottrell

⁵ 1996 (1) SA 812 (A)

⁶ This was confirmed in *Casey v FirstRand Bank Ltd*, 2014 (2) SA 374 (SCA)

⁷ *Coface SA v East London Own Haven*, 2014 (2) SA 382 (SCA) at para [23]

⁸ *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others*, 2010 (2) SA 86 (SCA)

Co Ltd, ELB Engineering Services Proprietary Limited and ELB Educational Trust for Black South Africans (which, as I have already indicated, I refer to as *the Consortium* or *the Contractor*). The Contract was to design and construct a 25-megawatt biomass power plant, which would produce electricity to be purchased from the Employer by Eskom. The plant is functionally complete, and Eskom confirmed on 11 March 2022 that the plant commenced with commercial operation. In other words, the Employer is selling electricity to Eskom.

[17] It was an express term of the Contract that the Contractor would procure the issue of a performance guarantee as security for the due fulfilment of the Contractor's obligations under the Contract. The Contractor obtained the Guarantee from Santam and it was renewed on 8 December 2022. The face value of the Guarantee is R251 139 938, and it is unconditional in its terms i.e. it is what is known as an 'on-demand bond'.

[18] The Contract makes provision for the Contractor to pay DLD's in the event of it not achieving the commercial operation of the plant by the contracted time for completion. The Contract also stipulates that the maximum amount of DLD's for which the Contractor could be liable is the amount of R192 386 797.85.

[19] During 2021 the project was in delay and over the period 19 January 2021 to 13 July 2021, the Employer issued tax invoices in which it levied the maximum amount of DLD's for which the Contractor could be liable thus for R192 386 797.85.

[20] In March 2021 discussions were held between the Contractor, represented by Mr Lee, and the Employer, represented by its Vice-President and alternate director, Mr Hawkes, which led to the parties reaching agreement that the DLD's would be set-off against monies otherwise due to the Contractor by the Employer (*the DLD*

discharge agreement). The upshot of this DLD discharge agreement was that the moneys due to the Contractor or which would fall due to the Contractor in future would not be paid by the Employer to the Contractor but be set off against the sum of R192 386 797.85 due by the Contractor. Another way of putting it is that the Contractor would 'work off' its indebtedness to the Employer. It is not insignificant that Mr Hawkes, who deposed to the answering affidavit, did not deny the existence of the DLD discharge agreement and thus no doubt, let alone serious doubt, was cast on the conclusion thereof.

[21] No payment certificates were issued during this period. The last payment certificate issued and paid was dated 9 December 2020 and was in respect of the Request for Payment number 34 dated 4 December 2020. There was also a further payment certificate dated 26 March 2021 in respect of a Request for Payment number 35 dated 15 January 2021 which was not paid and for which a credit note was issued by the Contractor.

[22] Thus for a period of a year, no payment certificates were issued. This much is common cause.

[23] On 10 May 2021, Mr Chirwa, the General Manager of the Employer, addressed a letter to the Contractor in which he confirmed the DLD discharge agreement as well as the fact that the discharge of the DLD's had commenced with the March 2021 invoices. The Employer did indeed withhold all payments due to the Contractor in order to offset the Contractor's indebtedness for the DLD's. However, insufficient monies were withheld to cover the full amount of the DLD's and it had been agreed between the parties in March 2021 that any DLD's that were not paid by way of set-off/discharge would be paid on demand.

[24] On 13 August 2021, the last of the DLD invoices became due (because it is 30 days from 13 July 2021 – the date the contractual cap was reached).

[25] On 30 September 2021, the Contractor obtained a ruling from SARS that the payment of DLD's is not a supply which carries an obligation to pay VAT. What the Contractor has not done in these papers is to explain why, if the DLD's had not been paid by 30 September 2021 in the sum of R164 163 815.10, it obtained a ruling from SARS about the payment of VAT. Remember, the Contractor's basis for calling up the guarantee is that the DLD's were never paid in such sum.

[26] In October 2021 the payment milestones were linked to the completion or commissioning of sections of the plant, and the last commissioning took place in October 2021. Thus, most of the work had been commissioned and signed off.

[27] On 29 November 2021, Mr Kim, representing the Contractor, wrote to Ms Seate, the Employer' financial manager:

'I am just informed that KC [the Contractor] and NE [the Employer] is discussing claims difference between DLD and EPC progress payment. As far as I heard, the number would be around 28m, and I am now busy to get the exact number that NE requests KC to pay.

In this regard, I need your help. The DLD numbers are very clear, however I found some differences from progress payments.

Would you please furnish me with the detailed progress payment record that NE has monthly base?'

[28] The question is, what is Mr Kim talking about if, as the Employer contends, nothing had been paid, discharged or set off? Why is Mr Kim talking about progress payments? This contemporaneous communication supports the Contractor's version of the conclusion of the DLD discharge agreement. More telling though, is the

response of Ms Seate, which response was copied to Mr Hawkes, in which she does not query the correctness of all communicated to her nor does she express surprise, bearing in mind that it is the Contractor's version that nothing had been paid and at that stage an amount of R192 386 797.85 was owing.⁹ Instead, she sent him a month-by-month payment schedule (*Ms Seate's schedule*).

[29] Mr Hawkes in his answering affidavit in this application, attempted to explain Ms Seate's schedule. He averred that the payments reflected there were only available for payment in 2022. But this is not so. From a reading of the correspondence of Ms Seate on 29 November 2021 and the spreadsheet attached by Mr Hawkes himself, it was available for payment in the 2021 year. It reflects the position as at December 2020 and it shows that R164 163 815.10 was available with which to pay the DLD's in 2021.

[30] In December 2021 the parties discussed the amount of the shortfall of the DLD's that had not been paid by way of set-off and agreed that the outstanding amount was R28 222 982.35. 26. This amount was confirmed by the

⁹ The legal effect of a party's failure to respond to an allegation which, if incorrect, would normally be met with a firm: 'No, that is not right, the correct position is as follows...' is described in *McWilliams v First Consolidated Holdings (Pty) Ltd* [1982 \(2\) SA 1 \(A\)](#) at 10E-H:

"I accept that 'quiescence is not necessarily acquiescence'¹ (see *Collen v Rietfontein Engineering Works* [1948 \(1\) SA 413 \(A\)](#) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion. (See *Benefit Cycle Works v Atmore* [1927 TPD 524](#) at 530 - 532; *Seedat v Tucker's Shoe Co* [1952 \(3\) SA 513 \(T\)](#) at 517 -8; *Poort Sugar Planters (Pty) Ltd v Umfolozi Cooperative Sugar Planters Ltd* 1960 (1) SA 531 (D) at 541; and of *Resisto Dairy (Pty) Ltd v Auto Protection insurance Co Ltd* [1963 \(1\) SA 632 \(A\)](#) at 642A - G

Employer's financial manager, Ms Seate, in discussions with the Contractor's project manager, Mr Jeon.

[31] In a letter dated 18 December 2021 to Mr Chirwa (of the Employer), Mr Jeon set out the Contractor's maximum liability for DLD's in the amount of R192 386 797.85 and confirmed that an amount of R164 163 815.10 had already been paid by way of set-off. He then sought the Employer's confirmation of the content of his letter and its acceptance that the remaining DLD amount due to the Employer was R28 222 982.35.

[32] On 20 December 2021, Mr Hawkes signed Mr Jeon's letter in the space provided and thereby confirmed the Employer's agreement with the content of that letter.

[33] Mr Hawkes thus confirmed that an amount of R164 163 815.10 had already been paid by the Contractor towards its indebtedness for the DLD's and that an amount of R28 222 982,35 constituted the remaining balance of the Contractor's indebtedness.

[34] Mr Hawkes sent the signed copy of Mr Jeon's letter under cover of an e-mail, copied to Nedbank's, Ms Aleksandra Pires, as well as Ms Seate.

[35] That e-mail followed on Mr Hawkes' earlier mail to Mr Kim from the Contractor, wherein Mr Hawkes enquired as to whether the Employer would be paid the amount of R28 222 282.35 on 20 December 2021.

[36] Mr Kim responded by saying that the Contractor was ready to make the payment on 20 December 2021 but hoped that the Employer would first confirm its agreement with the content of Mr Jean's letter of 18 December 2021 or inform the

Contractor if it had misunderstood the DLD discharge agreement between the parties.

[37] It was against that background that Mr Hawkes proceeded to sign the letter of 18 December 2021.

[38] Having received confirmation from the Employer that the amount of R164 163 815.10 had already been paid and that the amount of R28 222 282.35 remained to be paid, the Contractor duly paid the outstanding balance on 20 December 2021.

[39] The payment was acknowledged by Mr Chirwa on 20 December 2021. It had also been confirmed by Mr Hawkes, Ms Seate and Mr Chirwa that the DLD's in the amount of R164 163 815.10 had been paid by setting-off that amount against monies otherwise due to the Contractor.

[40] Thus, by 20 December 2021 it was common cause between the parties that the Contractor had paid its indebtedness for DLD's in full.

[41] However, Mr Hawkes in his answering affidavit explains his signature on the 18 December 2021 letter by contending that there was some sort of debate about the exchange rate. There is no sense to be made of this explanation. It certainly does not cast serious doubt on the version of the Contractor. This is so particularly if regard is to be had to the Employer's subsequent conduct.

[42] On 20 December 2021 and the day after the Contractor had paid the amount of R28 222 282.35, Mr Chirwa, the general manager acting on behalf of the Employer, acknowledged receipt and made no mention of the R164 163 815.10 which on the Employer's version was allegedly still outstanding:

'SUBJECT: BALANCE OF DLD PAYMENT

Contractor's letter, PN0075-ELB1-1000-PM-0631 Balance of DLD Payment, dated 18 December 2021, has reference.

Employer acknowledges receipt of **the balance** of DLDs and wishes to thank the Contractor for its kind consideration.'

(emphasis provided)

[43] That remained so until almost a year later, on 15 December 2022 at 23h04 on the evening before the commencement of a long weekend, when the Contractor received a letter from Mr Hawkes (representing the Employer) in which he informed the Contractor that it had incurred DLD's in the maximum amount allowed by the Contract of R192 386 797.85, that it had only paid an amount of R28 222 982.35 and that it was still indebted to the Employer in the amount of R164 163 815.10. The Contractor was further advised that if it did not pay the amount of R164 163 815.10 within 3 days, the Employer and/or Nedbank would demand payment of that amount from Santam under the Guarantee.

[44] On the public holiday of 16 December 2022, the Contractor responded to Mr Hawkes' letter, that it was common cause a year previously that the Contractor had paid the DLD's in the amount of R164 163 815.10.

[45] In its letter the Contractor pointed out to the Employer and Nedbank that any demand under the Guarantee for payment of DLD's, which the parties were in agreement had been paid a year before, would constitute a fraudulent demand and would compel the Contractor to approach the Court on an urgent basis for the requisite relief.

[46] On 9 January 2023 Nedbank on behalf of the Employer made a demand on Santam under the Guarantee for payment of the amount of R164 163 815.10.

The Annual Financial Statements

[47] On 28 February 2022 the Employer published its annual financial statements, audited by KPMG, and prepared by Ms Seate, the Employer's financial manager.

The Director's report records:

'The DLD amounts accrued of R192m were offset against the EPC unpaid amounts of R164m, with a balance of R28m paid by the EPC Contractor in December 2021.'

[48] The published financial records of the Employer are thus consistent with the facts advanced by the Contractor.¹⁰ These facts recorded in the annual financial statements were also independently corroborated by the auditors, KPMG.

[49] Mr Hawkes, a director of the Employer, attempted to explain this piece of damning evidence by contending that during February 2022, the Employer was unaware of the extent of the defects. He says that the Contract amount was R1 282 578 652 and that the Contractor had been paid R1 118 414 832. That left the total amount of R164 163 820 in relation to work that was still to be executed and for which payment would be claimed. He then stated that this provisional liability for monies (the R164 163 820) would become due on an uncertain future date and was recognised through an increase in the value of the asset. He said: *'Instead of reflecting the provisional liability in creditor's account and the unpaid receivable in a debtor's account the two, the one a provision and the other an unpaid receivable of the same amount for DLDs, were set off against each other.'*

[50] Mr Hawkes summarised the position and averred that the financial statements do not reflect that the Contractor's debt to pay DLD's had been extinguished, instead it reflected an accounting treatment of the (a) provisional increase in the value of the works and the provisional liability to make payment therefore and (b) the Employer's

¹⁰ This is repeated twice thereafter including in the management accounts

entitlement in respect of the DLD's. Mr Hawkes thus attempted to explain the thrice repeated confirmation of the set-off in the Annual Financial Statements on the basis that the Contractor '*conflates the legal principles relating to set-off with accounting principles and standards for the recognition of provisional liabilities and income*'.

[51] Mr Hawkes' qualification to express an opinion of an expert nature, being '*accounting principles and standards for the recognition of provisional liabilities and income*', is not furnished. I cannot accept this as expert opinion as I don't know what Mr Hawkes' qualifications are. He also does not provide corroboration of any factual witnesses at the time, such as Mr Chirwa or Ms Seatsi. Those were the people who were involved at the time. Ms Seatsi was the person who prepared the financial statements. There is no affidavit by her confirming the correctness of the underlying facts stated by Mr Hawkes on this issue.

[52] However, more problematic, when Mr Hawkes' explanation is assessed, it appears that Mr Hawkes says that the Annual Financial Statements were prepared, audited and signed off before the Employer obtained the reports on the alleged defects in the plant, and that the entries will be corrected in the Audited Financial Statements for 2023. Thus, Mr Hawkes conceded that the DLD discharge agreement was concluded but it was somehow only an interim arrangement to be adjusted in the fullness of time.

Set-off vs agreement to discharge DLD obligations

[53] The way the Employer disputes the consequences of the DLD discharge agreement is not to dispute it on a factual basis. In other words, it does not dispute its conclusion. Rather, it argues that the Contractor was obliged to allege and prove

the Employer's indebtedness to the Contractor, that such debt was due and legally payable and that the reciprocal debts were both liquidated.

[54] It contended that no amounts, as alleged by the Consortium were payable by the Employer to the Contractor. The Contract prescribes specific requirements for amounts to become due and payable to the Consortium. These requirements appear in Clause 85 of the Contract and include the following: the Consortium was to submit a request for payment to the Employer; the request was to be accompanied by the documents and information substantiating details of completed payment milestones, a status report describing the percentage completion of uncompleted payment milestones, a certificate by the Contractor that each obligation, cost or expense has been properly incurred, is properly charged and that all physical progress is as represented, that associated work has been completed in accordance with the Contract; and that each obligation, cost item or expense has not been the basis of a previous request for payment and that each sub-Contractor who performed work has been paid. A payment certificate was to be issued by the Employer. A valid tax invoice was to be issued by the Contractor.

[55] Mr Van Vuuren SC, representing the Employer argued most strenuously that if any claim was made for payment and if payment had become due to the Contractor, it would have had all the listed documents in its possession. It is, so the argument continues, therefore significant that the Contractor did not include any of the documents, which are pre-conditions to any amount becoming due for payment by the Employer, in the founding papers.

[56] Mr McAslin SC, representing the Contractor, drew attention to clause 84.4 of the Contract which reads:

‘Set off

Without limiting clause 84.7 and without prejudice to any other rights or remedies, but subject to the provisions of clause 18.2, the Employer may at any time deduct from any **moneys which are or may be payable to the Contractor** in connection with this Contract, any money which may be or is payable by the Contractor to the Employer. Nothing in this clause affects the right of the Employer to recover from the Contractor the whole of the debt or any balance that remains owing after any deduction.’ (emphasis provided)

[57] Clause 84.7 (e) contemplates liquidated damages expressly.

[58] The situation is quite simply that an agreement had been reached in which the DLD’s were being paid by ‘**moneys which are or may be payable to the Contractor**’. The Contractor asked the Employer how much it still owed on the debt and the Employer responded R28 222 982.35. The Contractor paid this and that settled the indebtedness in respect of the DLD’s as recorded by all the affected parties in the Annual Financial Statements.

[59] The question is whether the Employer is entitled to reverse the set-off based on alleged incomplete and defective work. What the Employer is required to do is to prove that the Contractor’s work was defective and incomplete to the value of what it now claims and to sue for that.

[60] What is clear, certainly on a *prima facie* level is that the DLD debt was paid by mutual agreement. The parties can agree amongst themselves that the debt has been discharged. The parties can call it what they like, ‘set-off’ or ‘discharge of debt’. The enquiry into the legal construct of ‘set-off’ is largely irrelevant. They had agreed on a mechanism for the settlement of the debt and they implemented that agreement. Whether it is called set-off or anything else is immaterial. The facts are clear or certainly on a *prima facie* basis. It bears mentioning that English is not the

first language of the parties, this much is clear from the few quoted portions of the letters referred to.

[61] Looking at the Contract in isolation it is clear that payment certificates were required and there are none. In December 2021, when no payment certificate had been issued in a year, the parties agreed that the DLD debt had been paid. Debts can be discharged by agreement, which is what happened here. The facts are uncontroverted.

[62] Mr Mc Aslin asks, if set-off did not take place, where is the R164 163 815.10? Is it sitting in a Bank account?

[63] The Employer cannot deny the fact of a 'set-off' and by means of that denial revive a debt in respect of DLD's which it knows it has been paid, in order to claim payment under the Guarantee. This, *prima facie*, appears to have been done deliberately to create a trigger entitlement where to its knowledge none exists.

The Guarantee and the Demand

[64] Clause 4 of the Guarantee provides:

'We, SANTAM LIMITED (Reg. No. 19181001680i06) ("Guarantor"), hereby irrevocably and unconditionally undertake with you that whenever you or the Facility Agent gives a written notice to us demanding payment by way of original letter (a "Demand"), without further proof or condition (which notice shall state that Contractor has failed to comply with its obligations in respect of the Contract, including any remedy period stipulated therein), we will, notwithstanding any objection which may be made by the Contractor and without any right of set-off or counterclaim, immediately, but within no later than 5 (five) Business Days, pay to you :

(a) in respect of amounts claimed as delay liquidated damages into the Operating Account (Account Number 1120842514, Branch Code 198765) with the Facility Agent;

(b) in respect of all other amounts into the Compensation Proceed Account (Account Number 1138181188, Branch Code 198765) with the Facility Agent; or

(c) into such other account as the Facility Agent may direct,

such an amount as you or the Facility Agent may in that Demand require not exceeding (when aggregated with any amount(s) previously so paid, under this Guarantee) the Guaranteed Sum ("Guarantee").

[65] In consideration of Santam executing the Guarantee, KC Cottrell Co. Ltd provided Santam with a counter-indemnity in terms of which it keeps Santam indemnified and holds Santam harmless from and against all claims, liabilities, costs, expenses, damage and/or losses (including loss of interest) of whatsoever nature sustained or incurred by Santam under or by reason or in consequence of having executed the Guarantee. In other words, if Santam pays out on the Guarantee, KC Cottrell Co. Ltd has to pay Santam.

[66] The demand made by the Employer does not state expressly that payment is sought to secure the Contractor's indebtedness in relation to the DLD's. However, there are two factors that link the demand to the DLD's: (i) the amount of the demand is the same, to the last cent; and (ii) the designated bank account into which Santam is instructed to pay the money is the same bank account that is recorded in paragraph 4(a) of the Guarantee as being for claims relating to 'delay liquidated damages' (DLD's).

[67] The Employer argues that clause 4 does not require a statement to be made that the Contractor is indebted to the Employer (or Nedbank). It is also not necessary to state that the Contractor is indebted to the Employer, either in the amount demanded or in any other amount.

[68] The Contractor's case however is not that the demand did not comply with the Guarantee, its case is that the demand is fraudulent. It applies the dicta of Justice Theron quoted above which is to the effect that when a demand is made but the person making the demand knows that the money is not due, such demand is made fraudulently.

[69] The interpretation of the Guarantee and an evaluation of whether the demand is compliant with clause 4, is irrelevant to the Contractor's invocation of the fraud exception. I need therefore not consider the findings of the Court in another application (involving the parties herein) under case number 2023/009986 where the court held that all the Employer is required to allege is an unremedied breach of contract.

The Consortium and its standing

[70] The Employer contended that the Consortium is not a party to the Guarantee contract and therefore has no *locus standi*. The Contractor's case is not a contractual attack. It relies on a common law fraud and as such, it says that any potential victim would have *locus standi*.

[71] The Contractor or the Consortium, is an unincorporated joint venture. It is a partnership with no standing outside of its partners. Each of the partners are before this court.

[72] If regard is had to the provisions of clause 1 of the Guarantee, the *locus standi* point is put to bed:

'The Employer entered into a contract dated 26th October 2016 with an unincorporated joint venture collectively comprised of ELB Engineering Services Proprietary Limited, K C Cottrell Co Ltd and ELB Educational Trust for Black South Africans ("Contractor") titled Engineering, Procurement and Construction

Contract ("contract") for certain works and services ("Works") to be performed by the Contractor for the Ngodwana Biomass Energy Project ("Project"), **in terms of which the aforesaid Contractor members have accepted unconditional joint and several liability for the performance of all the Contractor's obligations and the discharge of all the Contractor's liabilities under the Contract.'** (emphasis provided)

Nedbank's position

[73] Nedbank is the agent of the Employer because it is defined as the Facility Agent in the Guarantee. Clause 5 of the Guarantee requires the Employer to authorise Nedbank to make the demand and Santam is to pay those monies to an account of the Employer. Nedbank did not participate in this hearing. It abides the decision of this court. It is clear that it accepts that it is an agent acting with imputed knowledge of its principal, in this case the Employer.

Conclusion

[74] The evidence shows a *prima facie* case that the demand on the Guarantee for payment of the DLD's was fraudulent. Mr Hawkes for the Employer knew that he had manipulated things to secure an entitlement to trigger payment in terms of the Guarantee. If that is the case then a fraud is manifestly prejudicial, for which there is no alternative remedy and where the balance of convenience clearly favours the granting of the relief sought¹¹.

[75] As to the balance of convenience there is little or no prejudice to the Employer if it is able to prove its claim in due course. It still has the guarantee. It has simply been prevented from calling it up in circumstances where all indications are that it did so fraudulently. If in time it is able to show that there was no fraud, if it is able to

¹¹ See *Johannesburg Municipal Pension Fund and Others v City of Johannesburg* [2005 \(6\) SA 273](#) (W) para [8] and *Olympic Passenger Service (Pty) Ltd v Ramlagan* [1957 \(2\) SA 382](#) (D&CLD) at 383C-F

explain away Mr Hawkes' signature assenting to the balance due, if it is able to explain away Ms Seate's not having responded negatively to the Contractor's letter asserting the agreement having the effect of set-off, if it is able to explain away its financial statements which corroborate the Contractor's version and flatly contradict the Employer's, then it will defeat the action instituted and the Guarantee will be payable. Having the Guarantee in hand weighs heavily in the Employer's favour, it faces little or no risk of being unable to recover in due course should the ultimate resolution of the dispute between the parties be decided in the Employer's favour.

[76] At the trial in due course it can explain why Ms Seate, its financial director, never deposed to an affidavit supporting Mr Hawkes' explanation on the Annual Financial Statements and why it did not utilise a suitably qualified expert witness to substantiate its effort to explain away the damning entries in such financial statements in respect of which the audit firm KPMG made no adverse comment. On the other hand, if the Guarantee were paid out the funds would fall unsecured into the Employer's hands. This is a party whose conduct on these papers does not instil a deep sense of confidence that they will conduct themselves honourably should the funds have to be reimbursed in due course. Where the conduct of a party is *prima facie* fraudulent it will have to go a long way to assure a Court that it is a reliable repository of liquid funds. The Employer falls woefully short of that distance on these papers.

[77] The balance of convenience thus favours the Contractor who, on these papers, honoured its obligation to pay the damages due by it up to the maximum sum, a payment which it made in terms of an agreement as to how payment would be made, a payment made only after having established above the signature of Mr Hawkes of the Employer precisely what the outstanding balance was by agreement

between the parties. The Contractor then paid in cash the shortfall, as it had agreed it would, as any honest business person would be expected to. It was only a year later that it was confronted by a surprise call on the Guarantee. The timing of the call (after a year's delay and on the eve of a long-weekend) seems in itself to have been calculated to increase the chances of the Guarantee being paid out to the Employer before the Contractor could effectively react to raise the alarm of fraud. These are but some of the factors which weighed on my exercise of my discretion to grant interim relief, which I duly did.

[78] These then are the reasons for my order.

I Opperman
Judge of the High Court
Gauteng Division, Johannesburg

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Date of hearing: 23 May 2023

Date of Order: 10 November 2023

Date of Judgment: 7 December 2023