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

Case Number: 2035/2020

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

7 March 2024 .....
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SIGNATURE DATE

In the matter between:

GUARDRISK INSURANCE COMPANY LIMITED Applicant

and

BUCK, NICHOLAS JOHN AND OTHERS First to Tenth Respondents

JUDGMENT

FORD, AJ

Introduction

[1] This is an application for leave to appeal against my judgment and order dated 3 August 2023. I refer to the parties, as in the main application.

[2] The first to tenth respondents claim, that there are reasonable prospects that another court will come to a finding different to that of the court *a quo*. I refer to the first to tenth respondents collectively as “the respondents”.

The grounds of appeal

[3] The respondents contend that I erred in failing to find that any demand on a guarantee must strictly comply with the requirements of the guarantee, for it to be honoured and in so doing failed to heed the *dictum* set out in *Denel SOC Ltd v ABSA Bank Ltd and Others* [2013] 3 All SA 81 (GSJ) where the court stated:

> “A compliant demand is one that complies with the requirements of the counter guarantee, its terms and conditions of payment.”

[4] The respondents claim that I ought to have found that both the first and the second written demands were sent prematurely by the employer’s principal agent, and in so doing ought to have found that both the first and second written demands were non-compliant with clause 3.1 of the performance guarantee (“the guarantee”).

[5] Further that I erred in failing to make a finding that the premature delivery of both the first and second written demands rendered those demands unenforceable as against the respondents. It is further claimed that I ought to have found, that as a result of the premature delivery of the first and second written demands, there was no obligation on the respondents to make payment to the applicant on the strength of the written demands issued under the guarantee. And that I accordingly erred in making a finding that both the first and second written demands issued under the guarantee were compliant.

The legal position

[1] Section 17(1)(a) of the Superior Courts Act 10, of 2013, provides that leave to appeal "may only be given" when:- the appeal would have a reasonable prospect

of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

[2] In *MEC Health, Eastern Cape v Mkhitha*[1], touching on the test to be applied when considering an application for leave to appeal, the court held –

> Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there is truly a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard.
>
> An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable or realistic chance on appeal. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal." (Emphasis added).

[3] In *Smith v S*[2] the Supreme Court of Appeal, explained what *"reasonable prospects of success"* in section 17(1)(a)(i) meant. It said:

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

[4] In *Fair Trade Tobacco Association v President of the Republic of South Africa and Others*[3] a full bench held as follows:

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[1] 2016 JDR 2214 (SCA) para 16-17
[2] 2012 (1) SACR 567 (SCA) at para 7
[3] 2020 JDR 1435 (GP) at [6]

> "As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might find differently on both the facts and the law. It is against this background that we consider the most pivotal grounds of appeal."

[5] In *Democratic Alliance v President of the Republic of South Africa and Others*[4] the court held:

> "Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful."

Analysis

[6] The proposition that the respondents seek to advance, as correctly pointed out by counsel for the applicant (Mr. Kruger), is that payment certificate 24 was issued on 16 May 2019 and that payment certificate 25 was issued on 3 June 2019. That allegation is clearly incorrect. Payment certificate 24 was issued on 15 May 2019 and payment certificate 25 was issued on 29 May 2019. Both demands were therefore compliant with the guarantee.

[7] In its papers, and at the hearing before me, the respondents did not deny that Probuild gave consent to the applicant to issue the guarantee on behalf of the joint venture ("JV"). Nor was it denied that Probuild took full responsibility for the guarantee, should there be a call under the guarantee. As stated in the judgment *a quo*, the respondents simply took the point that the applicant had failed to prove that Probuild has, expressly and in writing, taken full responsibility for the guarantee should there be a call on the guarantee.

[8] However, from the consent letter, in which Probuild gave consent to the applicant to issue the guarantee for the JV, Probuild in fact took full responsibility for the

[4] (21424/2020) [2020] ZAGPPHC 326 (29 July 2020) at par [5]

guarantee – should there be a call under the guarantee. Moreover, in terms of the Deed of Indemnity, Probuild undertook to indemnify the applicant and to hold it harmless from all and against all claims, liabilities, costs, expenses, damages and/or losses of whatsoever nature sustained or incurred by the applicant under or by reason or in consequence of having executed or procured any guarantee or guarantees. It is immediately apparent that in order to give effect to the indemnity, Probuild undertook to pay to the applicant, immediately on first written demand, any sum or sums of money, which the applicant may be called upon to pay under the guarantees, and as previously stated, whether or not the applicant at such date shall have made such payment, and whether or not Probuild admits the validity of such claim against the applicant under the guarantee.

[9] The respondents allege that payment certificate 24 was issued to the JV on 16 May 2019. This is based on what is set out in paragraph 17.2 of the applicant's supplementary affidavit. I have considered paragraph 17.2 of that affidavit. It does not say that payment certificate 24 was issued on 16 May 2019. The relevant paragraph refers to Lanseria's letter dated 16 May 2019. In that letter, it is specifically recorded that payment certificate 24 is dated 15 May 2019. The preceding sub-paragraph records that the principal agent, signed payment certificate 24 on 15 May 2019. The Lanseria letter also records that the amount certified is payable within 21 calendar days of the date of the issuance of the payment certificate. That amount accordingly fell due on 5 June 2019.

[10] On 6 June 2019 Lanseria delivered its first written demand to the JV and a letter to Guardrisk (the applicant) advising that the payment certificate had been issued on 15 May 2019, and that the contractor had 21 calendar days to pay the amount to Lanseria. The JV failed to pay the amount certified and on 24 June 2019, Lanseria demanded payment under the guarantee from Guardrisk, as it was entitled to do.

[11] In respect of the second demand under certificate 25, the respondents allege that in Lanseria's letter to the applicant states that the payment certificate in favour of Lanseria had been issued on 3 June 2019. That recordal, so explained Mr.

Kruger, is in conflict with the contents of payment certificate 25 which records that the principal agent signed it on 28 May 2019.

[12] In light of the papers before me, and at the hearing, it was evident that the reference to the date of issuance in respect of payment certificate 25 as being issued on 3 June 2019, was clearly wrong. Payment certificate 25 was in fact issued on 28 May 2019 and accordingly became payable on 18 June 2019. That amount was not paid by the JV and accordingly on 24 June 2019, Lanseria issued a written demand calling upon the JV to pay the account within 7 calendar days. And on 2 July 2019, Lanseria demanded payment of the amount reflected in payment certificate 25, under the guarantee.

[13] The demands in respect of both payments certificates were sent on time and the written demand complied with clause 3.1 of the guarantee. Apart from the finding on compliance, it is also useful to restate the fact that it was Probuild who requested the applicant to issue the guarantee, and did so in writing. It thereby consented to the issuance of the guarantee and took full responsibility for the guarantee should there be a call on the guarantee. As previously stated, even if Lanseria's demand was for any reason deficient, the respondents were still obliged to pay the amount to the applicant, whether or not the respondents admit the validity of the demand.

[14] I do not see how the respondents' reliance on *Denel* assists them. I have carefully considered that judgment and what Malindi AJ (as he was then) said, in respect of guarantees. He said[5]:

> Similarly, in my view, in the case of demand guarantees, the beneficiary must meet the conditions specified in the guarantee. Whether the condition or term of the guarantee *"conform strictly to the requirements of the credit"* or to the principle of *"strict compliance"*, is a matter of a proper interpretation of the guarantee itself. (Footnotes omitted).

[15] In the matter before me, the beneficiary has in fact met the conditions specified in the guarantee and has complied fully with the written demands as reflected in payments certificates 24 and 25, which I find were compliant with paragraph 3.1

[5] *Denel SOC Ltd v ABSA Bank Ltd and Others* [2013] 3 All SA 81 (GSJ) para 50

of the guarantee.

[16] I do not believe that the respondents have any prospects of success on appeal. The appeal courts should not be burdened with applications that have *"doomed to fail"* written all over it. Court resources are scarce and ought to be employed in the administration of justice in deserving cases. It should not be employed to give audience to cases that have *absolutely* no prospects of success.

[17] In the result, I make the following order:

ORDER

1. The application for leave to appeal is refused.

2. The first to tenth respondents (excluding the ninth respondent), are ordered to pay the applicant's costs.

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B. FORD
Acting Judge of the High Court
Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 7 March 2024 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 March 2024.

Date of hearing: 26 February 2024
Date of judgment: 7 March 2024

Appearances:

For the applicant: Adv. A.N. Kruger
Instructed by: Moll Quibell & Associates

For the respondents: Adv. A. Thompson
Instructed by: Van Der Wath Attorneys