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

CASE NO: 2024 - 030334

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

DATE
SIGNATURE

In the application by

GMK CIVILS (PTY) LTD	Applicant
And	
BRYTE INSURANCE COMPANY LTD	First Respondent
MEC: DEPARTMENT OF ROADS AND TRANSPORT: GAUTENG PROVINCE	Second Respondent

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JUDGMENT

MOORCROFT AJ:

Summary

Demand guarantee – autonomy of – court will not go behind a demand guarantee except when guarantee is tainted by fraud - payment must be made upon presentation of complying documents

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*

2. *The applicant is ordered to pay the costs of the application on the scale as between attorney and own client.*

[2] The reasons for the order follow below.

Introduction

[3] This is a judgement in the urgent court. The applicant seeks an order that, pending the determination of rights in arbitration proceedings instituted by the applicant on 6 February 2024, the first respondent be restrained from paying the amount of R16,988,439.92 due under a performance guarantee to the second respondent, and that the second respondent be restrained from making the demand.

[4] The first respondent has given an undertaking not to pay the amount due pending the finalisation of this urgent application. This was a sensible and professional attitude to adopt. The first respondent is however not opposing the relief sought and abides the decision of the court.

[5] PCBS Construction and Customs Bond Services (Pty) Ltd as underwriting managers of the first respondent issued the fixed performance guarantee on 12 July 2022. The guarantee provides that the guarantor's performance is restricted to the payment of money.[1] The guarantor undertook[2] to pay to the employer (the second respondent) the sum certified upon receipt of specific documents identified in the guarantee. These documents are -

5.1 a copy of a first written demand[3] issued by the second respondent to the applicant stating that payment of a sum certified by the second respondent's agent in an interim or final payment certificate has not been

1 Clause 3.1.2.
2 Clause 3.2.
3 Clause 3.2.1.

made in terms of the contract and facility within seven calendar days, and that the employer intends to call upon the guarantor to make payment in terms of clause 3.2.2.

5.2 a first written demand issued by the second respondent to the guarantor at the guarantor's physical address with a copy to the contractor (the applicant) stating that the period of seven days has elapsed since the first written demand in terms of clause 3.2.1 and the sum certified has still not been paid.

5.3 a copy of the aforesaid payment certificate which entitled the second respondent to receive payment of the sum certified.

[6] The autonomy of demand guarantees is sacrosanct. Like letters of credit they are autonomous documents independent of the underlying agreement between, in this case, the applicant and the second respondent. The first respondent is obliged to make payment when presented with complying documentation. The only question that arises from the point of view of the guarantor, the first respondent, is whether or not it is presented with complying documentation, and if it is then payment must be made.

[7] Demand guarantees[4] are in the words of Lord Denning MR[5]

> *"…virtually promissory notes payable on demand…. the performance guarantee stands on a similar footing to a letter of credit."*

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[8] It is no exaggeration that the autonomy of demand guarantees and documentary letters of credit is a prerequisite for trade. Donaldson LJ remarked in *Intraco Ltd v Notis Shipping Corporation (The Bhoja Trader)*[6] that:

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4 Also known as performance bonds, performance guarantees, demand guarantees, advance demand guarantees, or construction guarantees. A better description might be 'documentary guarantees' as performance depends on the presentation of the required documents as is the case with a 'documentary [letter of] credit.'

5 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976 (CA) (1977) 3 WLR 764.

6 *Intraco Ltd v Notis Shipping Corporation (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256 (CA) 257. See also *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607 (CA) 613b, *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A) 816G-817A; [1996] 1 All SA 51 (A), *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA) para 20, *Bombardier Africa Alliance Consortium v Lombard Insurance Company Limited and another* [2020] JOL 48680 (GP), *Compass Insurance Company Ltd v Hospitality Hotel Developments (Pty) Ltd* [2011] JOL 27976 (SCA), *Nedbank Limited and another v Procprops 60 (Pty) Limited* [2015] JOL 33537 (SCA).

> *"Irrevocable letters of credit and bank guarantees given in circumstances such as that they are the equivalent of an irrevocable letter of credit have been said to be the lifeblood of commerce. Thrombosis will occur if, unless fraud is involved, the Courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand."*

[9] In *Coface SA Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association*[7] the Supreme Court of Appeal reiterated that a guarantor's obligation to perform was wholly independent from an underlying construction agreement between a contractor and its employer and that disputes in relation to the underlying construction agreement were accordingly irrelevant to the guarantor's obligation to perform in terms of the guarantee.

The Supreme Court of Appeal in express terms said that the majority decision in *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO*[8] was wrong to the extent that it created a new exception relating to the findings in an arbitration.

[10] The demand guarantee is therefore an autonomous document that creates an autonomous obligation. A guarantor does not exercise a discretion when making payment and the guarantee must be paid according to its terms. The guarantor evaluates the documents presented and if the documents conform, it makes payment. Liability is not affected by the underlying relationship.

[11] Fraud uncovers all and payment on a guarantee can be resisted on the basis of fraud. This constitutes an exception to the rule that the demand guarantee, like a letter of credit, is autonomous. A court will therefore not go behind the demand guarantee in order to decide whether payment should be made.

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7 *Coface SA Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA); [2014] 1 All SA 536 (SCA). The Supreme Court of Appeal held that the majority decision in *Dormell Properties 282 CC v Renasa Insurance Co Ltd and others* 2011 (1) SA 70 (SCA); [2011] 1 All SA 557 (SCA) that created an exception to the principle enunciated above, was wrong. The minority judgment by Cloete JA (Mpati P concurring) in *Dormell* was endorsed by the later judgement.

8 *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO* 2011 (1) SA 70 (SCA), [2011] 1 All SA 557 (SCA).

[12] Disputes arose between the applicant and the second respondent relating to the fulfilment of obligations in terms of the underlying agreement but these disputes do not affect the demand guarantee. The applicant and the second respondent have embarked on arbitration proceedings to resolve these disputes. The first respondent is not a party to the arbitration agreement or to the disputes.

[13] For these reasons the application must fail.

Urgency

[14] The second respondent gave notice of termination of the underlying agreement on 8 September 2023 in a letter entitled *"Notification in terms of clause 9.2 – termination by employer"*. The letter contained the required 14 days notification to rectify the faults in accordance with clause 9.2.1 of the contract.[9] The 14 day notice period commenced on 12 September 2023 and expired on 26 September 2023. One special non-working day had to be added to the notification timeframe and this meant that the second respondent was entitled to terminate the project on 27 September 2023.

[15] On 30 November 2023 in a letter that was received 6 December 2023 the second respondent gave notice of termination of the contract and stated that it would *"submit a 'First written demand' to claim the full guaranteed sum from the guarantor."*

[16] The applicant knew of the threatened demand already on 6 December 2023 and did not seek an order until March 2024. The notice of motion and founding affidavit were both signed on 19 March 2024.

[17] An urgent application must be brought as soon as possible and an applicant is expected to provide cogent reasons for any delay. This the applicant failed to do. The applicant is the author of the urgency.[10]

[18] The applicant is therefore not entitled to invoke rule 6 (12).

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9 The General Conditions of Contract for Construction Works (2015) 3rd edition published by the South African institution of Civil Engineering was applicable.

10 *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) 94C–D*; Stock v Minister of Housing* 2007 (2) SA 9 (C) 12I–13A*; Kumah v Minister of Home Affairs* 2018 (2) SA 510 (GJ) 511D–E.

Costs

[19] The applicant launched this application in the urgent court under circumstances where it knew that it was seeking to go behind an autonomous demand guarantee and with knowledge of the long line of decisions in this regard and in particular the clear and unequivocal statements by the Supreme Court of Appeal in *Coface* in 2014.[11]

The second respondent sought a punitive cost order against the applicant on the basis that the applicant waited from December 2023 until March 2024 to bring the application at short notice.

I am of the view that a punitive cost order is justified.

Conclusion

[20] in summary,

20.1 the application is not urgent;

20.2 the demand guarantee is an autonomous document and a court will not go behind the guarantee to evaluate the underlying agreement and disputes between the applicant and the second respondent;

20.3 an attorney and own client cost order is justified.

[21] For the reasons as set out above I make the order in paragraph 1.

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MOORCROFT AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose

[11] *Coface SA Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA); [2014] 1 All SA 536 (SCA).

name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **27 March 2024**

COUNSEL FOR THE APPLICANT:	MC MALATJI
INSTRUCTED BY:	R BALOYI INC
COUNSEL FOR THE SECOND RESPONDENT:	MH MHAMBI
INSTRUCTED BY:	STATE ATTORNEY
DATE OF ARGUMENT:	26 MARCH 2024
DATE OF JUDGMENT:	27 MARCH 2024