

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023/028000

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

DATE: 06 June 2024

SIGNATURE

In the matter between:

EXXARO COAL MPUMALANGA (PTY) LTD
and
ABSA BANK LTD

Applicant

Respondent

**TDS PROJECTS CONSTRUCTION AND
NEWRAK MINING JV (PTY) LTD**

Intervening party

JUDGMENT

FISHER J

Introduction

[1] This is an application by TDS Projects and Newrak Mining JV (Pty) Ltd (TDS) to join in the main application in terms of rule 12.

[2] The main application involves a claim by Exxaro Coal Mpumalanga (Pty) Ltd (Exxaro) against the respondent, ABSA Bank Ltd (ABSA) in terms of an on- demand guarantee issued by ABSA on the instruction of and behalf of TDS as security in terms of a building contract and underwritten by Hollard Insurance Company Ltd (Hollard)

[3] The issues in the main application are relatively straightforward as far as the well-entrenched legal principles pertaining to on-demand guarantees are concerned.

[4] This intervention application represents an attempt to create a case which allows for a departure from these principles. These principles are famously impervious to such a departure other than in the case of fraud.

Test to be met for intervention

[5] The test is whether a party has a legal interest in the subject-matter which may be affected prejudicially by the judgment of the court in the proceedings concerned.¹

[6] It is not every interest in a dispute which will entitle a party to join or be joined in legal proceedings. It is not enough if a person simply has an interest in a finding or in certain reasons for an order. The interest must be a legal interest: that is an interest in the order or the outcome of the litigation.²

Facts

¹ *Gordon v Department of Health, Kwazulu-Natal* (2009 (6) SA 522 (SCA), at para 9.

² *Lebea v Menye and Another* [2022] ZACC 40, at para 30.

[7] On 12 July 2018, Exxaro and TDS concluded a written agreement for the construction of the mechanical and electrical plant, civil, building and engineering works on a project involving Exxaro's Matla Coal Mine (the construction contract).

[8] TDS procured the performance guarantee in issue as security for the fulfilment of its obligations in the amount of R32 082 012.90, as required by the construction contract. The guarantee was issued by ABSA subject to the following material terms:

- a. the guaranteed amount would be paid to Exxaro on receipt by ABSA of a written demand stating that such an amount was due and payable;
- b. written demands would be signed by a person who warranted that he/she was duly authorised to do so;
- c. the guarantee would expire on 19 June 2020 (the expiry date) and any claim and statement would have to be received by ABSA before the expiry date; and
- d. after the expiry date, the guarantee would lapse and any statement received thereafter would be ineffective.

[9] On 9 June 2020 Exxaro sent a letter to TDS terminating the construction contract with immediate effect on the basis that TDS had committed breaches thereof which it had failed to remedy. TDS denies having committed those breaches. Facts relating to these alleged breaches are not relevant to this intervention application or the main application.

[10] On 10 June 2020 Exxaro sought to invoke its rights under the guarantee by sending a demand to ABSA claiming that the guaranteed amount had become payable as a result of TDS's failure to perform in terms of the construction contract (the first demand).

- [11] ABSA responded with the advice to Exxaro that the demand was 'deemed unfit for processing' by ABSA on various bases which I need not go into. This advice was followed by a letter from Exxaro suspending the first demand.
- [12] On 19 June 2020 Exxaro sent another letter to ABSA retracting the suspension and claiming a lesser amount of R22 165 055.66 (the second demand). Save for this lesser amount the second demand was the same as the first.
- [13] On 25 June 2020 TDS applied to this court for an interim order interdicting Exxaro from demanding, and ABSA from making, payment of any amount under the guarantee pending determination of relief sought in Part B of that interdictory application.
- [14] In Part B, TDS sought an order declaring that the demands made by Exxaro for payment of the guarantee were invalid and a final interdict preventing ABSA from making payment of any amount under the guarantee.
- [15] Exxaro opposed the application and lodged a counter- application to compel TDS to provide a new or revised guarantee on the basis of an alleged agreement TDS had allegedly reneged on.
- [16] The parties ultimately agreed on interim relief and this court was called upon to determine Part B of the application. Although ABSA abided the court's decision, it filed an affidavit to state its position.
- [17] The grounds for the interdict were as follows. TDS alleged that the first and second demands were fraudulently made and that it had a clear right to prevent Exxaro from unlawfully benefiting under the guarantee. It further alleged that the demands did not comply with the terms of the guarantee in that they were not signed by a person warranting that they had authority to do so; they failed to state that the

amount claimed was due and payable; and they did not indicate the respects in which TDS had breached the contract. As such TDS argued that ABSA was not legally obliged to honour the guarantee.

Issues

[18] TDS claims that it has the type of interest necessary to allow joinder in the main application on the following two grounds:

- a. First, that there is a concrete financial interest which exists in a deed of indemnity and consequent deposit provided by TDS directly to Hollard;
- b. Second, that it wishes to join in order to raise fraud or at least unconscionable conduct on the part of Exxaro.

[19] I will deal successively with these grounds.

The financial interest

[20] As a condition precedent for the issuance of the Hollard Guarantee and to secure the Absa guarantee TDS deposited the sum of R4,812,301.94 against which Hollard would be entitled realize the entire amount or such portion thereof as may be necessary to discharge TDS's liability to Hollard at any time. Hollard will not release the deposit to TDS until Absa releases Hollard from its obligations to ABSA.

[21] The high watermark of TDS's application is that it has substantial rights under the deed of deposit and the deed of indemnity which may be affected by the main application and that it seeks to protect such rights by a presence in the intervention application.

[22] TDS's position vis-à-vis Hollard does not accord to TDS the necessary interest. In the main application Exxaro seeks to enforce the terms of the guarantee against ABSA. Such an order would only be enforceable against ABSA. By virtue of the autonomous nature of the guarantee TDS has no legal interest in the outcome of the main application.

[23] The interest that TDS contends for clearly lies in the other commercial arrangements that TDS, Hollard and ABSA have voluntarily put in place. Arising out of these arrangements TDS retains its ordinary contractual remedy against ABSA should it pay under the guarantee when it is not legally entitled to do so. This remedy is a complete defence to any claim by ABSA founded on the guarantee.

[24] There is no basis for an intervention for these reasons.

[25] I did not understand Mr van Tonder SC to press this ground with any vigour, but it was not specifically abandoned so I have dealt with it.

The fraud/unconscionable behaviour

[26] This was the main basis raised for the joinder.

[27] The performance guarantee issued by ABSA is a demand guarantee. As was held in *Loomcraft Fabrics CC v Nedbank Ltd and Another (Loomcraft)*³ and numerous cases that followed it, a demand guarantee is akin to an irrevocable letter of credit, which establishes a contractual obligation on the part of the bank to pay the

³ *Loomcraft Fabrics CC v Nedbank Ltd and Another* [1996] 1 All SA 51 (A); 1996 (1) SA 812 (A) at 815G- J; *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA) para 20; *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA) paras 10-13.

beneficiary on the occurrence of a specified event, and is wholly independent of the underlying contract. In construction agreements such guarantees are habitually required by employers before they will enter into an agreement with a contractor. It is not disputed that this security was a sine qua non of the contractual relationship between Exxaro and TDS.

[28] The importance of allowing financial institutions to honour their obligations under irrevocable credits without judicial interference, was stressed in *Loomcraft*, where it was stated that an interdict to restrain a bank from paying under a letter of credit would not be granted save in the most exceptional cases.⁴

[29] The device of the guarantee is neat: provided the demand is made on the terms provided in the guarantee instrument, the bank that has issued the instrument must pay in accordance with its tenor. There is no resort had by the bank to any dispute under the contract it secures. Indeed, the very purpose of the guarantee is to avoid embroilment in these contractual disputes which have the potential leave an employer under a construction contract with no redress.

[30] The contractor in the position of TDS has its ordinary contractual remedy against the bank should it fail to honour the guarantee in accordance with its terms. If ABSA were to honour the guarantee when the demand to do so did not comply with the terms of the guarantee (as is squarely raised by ABSA in the main application) TDS would have a complete defence to a claim by ABSA based on its having done so.

[31] The only basis on which any liability of TDS might arise, whether to ABSA or any other party, would be if ABSA were lawfully obliged to honour the guarantee. Thus, non-compliance with the terms of the guarantee by Exxaro in making its demand does not affect the rights of TDS. Neither will payment of the guarantee by ABSA result in a violation of a right of TDS.

⁴ *Loomcraft* fn 2 above at 816D-H.

[32] It is conceded by Mr van Tonder SC on behalf of TDS that the only way that his client can be let in to the main action is if there is clear evidence of fraud.

[33] The fraud contended for in the founding affidavit in this application is that Exxaro's claim in the first demand was for an amount which was in excess of the amount which it was entitled to claim under the guarantee. This inflated claim allegedly came about in the following circumstances. The terms of the guarantee provided that payment thereunder was subject to a maximum of 10% of the contract price. The contract price was initially R320,820,128.54 but it was subsequently reduced to R220,270,897.63. Hence any amount due in terms of the guarantee could not exceed the sum of R22,165,055.66. The first demand was based on the pre-amended contract price. This failure to adjust for the amended price allegedly constituted a deliberate demand by Exxaro for payment of an amount which was self-evidently not due. This was later corrected in the second demand and the fact of such correction is indicative of fraud in the first demand. Thus, it is argued that TDS is entitled to join for the purposes of raising this fraud.

[34] To my mind, these allegations do not meet the threshold of establishing even prima facie the clear case of fraud such as would be necessary to give TDS any basis to raise the fraud exception to the autonomy of the guarantee.

[35] The allegations of dishonesty are dealt with adequately in the main application by Exxaro's Ms Corina Koorsen who made the demands in the context of the negotiations and discussions leading up to the making of the second demand on the guarantee's expiry date.

[36] The heads of argument filed by TDS seem to accept, at least in the alternative, that these allegations fall short of a case for fraud. The heads make the suggestion that it would be enough if only unconscionable behaviour were shown. Mr van Tonder wisely did not press this more expansive approach in oral argument.

Costs

- [37] Exxaro seeks costs on a punitive scale. The argument is that these proceedings are abusive. A main contention is that the question of fraud was raised and decided against TDS in the SCA.
- [38] Further heads were filed in this regard – Exxaro arguing that the existence of fraud had been decided and TDS arguing that the fraud aspect was not actually dealt with by the SCA as the case was decided on a lack of proof of the interdictory elements and not an absence of fraud.
- [39] In light of the conclusion to which I have come - i.e. that the right to be joined to raise the fraud exception is not, in any event, made out in the founding affidavit it is not necessary for me to resolve this res judicata/estoppel argument.
- [40] The real question to be asked is whether it was, given the strict legal parameters operative in relation to on-demand guarantees, ever viable to raise so flimsy an attempt at garnering a basis for intervention into a straightforward dispute on the guarantee.
- [41] I agree with Mr Bothma SC that the application to join is frivolous. TDS, having been involved in similar questions which have taken the matter all the way to the SCA should, in my view, have been more circumspect.

Conclusion

[42] An interest which rests on the ability and entitlement to make out the fraud exception is not established and neither is any other direct and substantial interest established.

[43] *Order*

The application to intervene is dismissed with costs such costs to include the costs of two counsel where employed and such costs to be on the scale as between attorney and client.

FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 06 June 2024.

Heard: 29 April 2024

Delivered: 06 June 2024

APPEARANCES:

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