



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

Case Number: 2020/34408

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/ NO

(3) REVISED: YES/NO

----- 19/01/2024

Signature

Date

In the matter between:

HOLLARD INSURANCE COMPANY LTD

APPLICANT

And

FORCE FUEL (PTY) LTD

FIRST RESPONDENT

LABAT AFRICA LTD

SECOND RESPONDENT

JUDGMENT

TSATSAWANE AJ

INTRODUCTION:

- 1 The applicant seeks an order in terms of which the second respondent is directed to pay it an amount of R 20 000 000, 00 together with interest thereon “*at the prime overdraft rate of Absa Bank Limited, plus 2% from 10 April 2020 to repayment thereof*” and costs of the application on an attorney and client scale¹.
- 2 The relief which the applicant seeks is opposed by the second respondent on grounds set out in its affidavits filed of record.
- 3 The applicant is a public company registered as a short-term insurance company and it is also “*registered to conduct guarantee insurance business*”². The applicant is said to be in the business of issuing payment guarantees on behalf of role players in the fuel procurement industry and secures its guarantee obligations by, amongst others, obtaining indemnities and suretyships in its favour³.
- 4 On 19 August 2019, the first respondent executed a deed of indemnity as guarantor in favour of the applicant. A copy of the deed of indemnity is attached to the founding affidavit as FA2. The deed of indemnity records that the applicant has agreed to, “*at the written request of the Guarantor ... execute or*

¹ Paragraph 1 of the notice of motion.

² Paragraph 5 of the founding affidavit.

³ Paragraphs 8 and 9 of the founding affidavit.

procure the execution, of a Guarantee or Guarantees on behalf of the Guarantors or any subsidiary, associated company or companies ... or any other entity or person mentioned in such written request/s, which request/s shall be regarded as incorporated herein.”

5 In terms of the deed of indemnity:

“3. *The Guarantor undertakes and agrees to pay to the Insurance Company immediately on first written demand any sum or sums of money which the Insurance Company may be called upon to pay under the Guarantee/s, whether or not the Insurance Company at such date shall have made such payment, and whether or not the Guarantor admits the validity of such claim against the Insurance Company under the Guarantee/s.*

3.1 *In the event of the Insurance Company having made any payment or incurred any costs or expenses, the amount thereof shall bear interest at the rate of 2% ... above prime overdraft rate from time to time charged by Absa Bank Limited, from time of payment by the Insurance Company to date of payment by the Guarantor to the Insurance Company. The Guarantor’s liability in terms hereof shall be limited to any claim, loss, demand or liability that the Insurance Company may be called upon or incur by reason or in consequence of issuing or procuring any Guarantee/s, plus interest and cost.”*

6 On 16 August 2019, the second respondent executed a deed of suretyship and indemnity in favour of the applicant. A copy of the deed of suretyship and indemnity is attached to the founding affidavit as FA3. The deed of suretyship and indemnity records that the applicant has, at the first respondent's request, *“furnished or provided and may hereafter furnish or provide, at the written request of the Guarantor, certain guarantees ... in favour of certain persons, companies ... for the due payment by the Guarantor or any other company ... mentioned in such request ... of any monies now or from time to time hereafter owing ... under any contract which it may have entered into or which it may thereafter enter into.”*

7 In terms of the deed of suretyship and indemnity:

7.1 the second respondent *“hereby interpose and bind myself/ourselves as surety/sureties for and co-principal debtor/s jointly and severally with the Guarantor, in solidum for the due payment by the Guarantor to the Insurance Company of all and any amounts which the Guarantor may be liable to pay to the Insurance Company under the Indemnity”;*

7.2 the second respondent further undertook and agreed *“to pay the Insurance Company on demand any sum or sums of money which the Insurance Company may be called upon to pay under any Guarantee whether or not the Insurance Company shall, at such date, have made such payment, and whether or not the Guarantor ... admit the validity of such claims against the Insurance Company under the Guarantee.”*

- 8 In a letter dated 8 August 2019⁴, the first respondent requested the applicant “to issue a guarantee, in the name of FuelEx (Pty) Ltd ... in favour of Engen, in the amount of R 20 000 000.” This letter is on the first respondent’s letterhead and was signed by Gordon Walters in his capacity as the first respondent’s financial director⁵. This was accordingly the first respondent’s request to the applicant to issue a guarantee on behalf of “any other entity or person mentioned in such written request/s” as contemplated in the deed of indemnity. The question whether this request was made at the behest of FuelEx (Pty) Ltd is irrelevant to the question whether the second respondent is liable for the first respondent’s debts in terms of the deed of suretyship and indemnity.
- 9 Pursuant to the aforesaid request and on 13 August 2019, the applicant issued a guarantee in the name of FuelEx (Pty) Ltd in favour of Engen Petroleum Ltd in the requested amount of R 20 000 000, 00⁶.
- 10 On 6 April 2020, Engen Petroleum Ltd claimed the aforesaid amount of R 20 000 000, 00 from the applicant in terms of the aforesaid guarantee. The applicant paid the amount of R 20 000 000, 00 to Engen Petroleum Ltd on 10 April 2020.
- 11 In its answering affidavit, the second respondent contends that the conclusion of the deed of suretyship and indemnity was not authorised and that it is not bound

⁴ Annexure FA4 to the founding affidavit.

⁵ Gordon Walters was also the second respondent’s financial director, a fact which is restated in paragraph 23 of the second respondent’s heads of argument.

⁶ Annexure FA5 to the founding affidavit.

by it. It further contends that the conclusion of the deed of suretyship and indemnity would constitute the provision of financial assistance to the first respondent in terms of section 45 of the Companies Act 71 of 2008 and that there was no compliance with that section and consequently, the deed of suretyship and indemnity is void.

12 In its supplementary answering affidavits, the second respondent denies liability on the basis that:

12.1 The guarantee was issued before the execution of the deed of suretyship and indemnity and that it does not fall within the scope and ambit of the deed of indemnity as a result of which the first respondent was not liable to the applicant. There is no merit in this contention because the deed of suretyship and indemnity covers the amounts due and payable by the first respondent in terms of its deed of indemnity, even amounts which the applicant may not have paid out yet.

12.2 The first respondent concluded an agreement with FuelEx (Pty) Ltd in terms of which it only purchased fuel in the amount of R 4 289 701, 71 and that it cannot be liable for more than that amount. There is also no merit in this contention because the first respondent's deed of indemnity covers the first respondent's liability for the amounts guaranteed and paid by the applicant. In any event, the first respondent agreed to pay the applicant "*any sum or sums of money*" which the applicant may be called upon to pay under the deed of indemnity. In this case, that amount is R 20 000 000, 00.

13 As far as the authority point is concerned, the second respondent says that the applicant's reliance on the second respondent's resolution authorising the conclusion of the deed of suretyship and indemnity is wrong. It further says the following in its heads of argument:

“55 ... That resolution demonstrates that there were seven (7) directors at Labat whose signatures were sought. Only four (4) of the seven (7) directors signed the resolution. But importantly, one (1) of the four (4) directors is Mr Walters, whom Labat contends was not authorised to conclude the Surety. Mr Walters cannot grant authority to himself. His representation as to his authority is of no moment.

56 Therefore, only three (3) of the seven (7) directors actually attempted to grant authority to Mr Walters to sign the Suretyship. As a matter of fact, therefore, Mr Walters was not authorised by the majority (or all) of the directors of Labat ...”

14 I do not agree with the second respondent's contention that the conclusion of the deed of suretyship and indemnity was not authorised. Gordon Walters did not authorise himself to conclude the deed of suretyship and indemnity as contended by the second respondent. Gordon Walters did not act in his personal capacity. The second respondent's resolution expressly states that it is the second respondent, not Gordon Walters, which “*shall interpose and bind itself in favour of the Insurance Company*” and that the second respondent's board of directors and shareholders have authorised the second respondent to “*provide financial*

assistance to any one or more inter-related company/ies” and then goes on to authorise Gordon Walters and Brian Van Rooyen to sign the deed of suretyship and indemnity. The same resolution further confirms that the second respondent has complied with the provisions of section 45 of the Companies Act 71 of 2008.

- 15 The fact that Gordon Walters is one of the directors who signed the necessary resolution is of no moment. There is no suggestion that Gordon Walters was conflicted and that he could not, for this reason, participate in passing the resolution. For as long as Gordon Walters was not in law disqualified from participating in passing the resolution, the resolution is good in law. The resolution authorised Gordon Walters, in his capacity as financial director to conclude the deed of suretyship and indemnity.

- 16 In addition, the resolution further provides that:

“The Board of Directors and Shareholders of the Company authorised the Company to provide financial assistance to any one or more inter-related company/ies or corporation’s and/or any one or more juristic persons who are members of or are related to any such inter-related Company. The Board confirms that the decision to provide such financial assistance was granted pursuant to authority granted to the Board of Directors by the Shareholders during the past 24 (twenty-four) months.”

- 17 In the premises, there was both shareholders and board approval for the second respondent to conclude a transaction such as the deed of suretyship and indemnity in favour of the first respondent.
- 18 In its replying affidavit, the applicant says that⁷: “*Labat provided copies of these resolutions to the Applicant*” and that by doing this, the second respondent represented to the applicant “*that its shareholders had authorised it to provide financial assistance to Force Fuels.*” There is no evidence to contradict this version. Without this version being contradicted, the second respondent’s lack of authority defence must fail.
- 19 On a proper interpretation of the deed of indemnity and the deed of suretyship and indemnity the correct position is the following:
- 19.1 The applicant agreed to execute guarantees at the first respondent’s written request and to do so on behalf of the first respondent “*or any other entity or person mentioned in such written request/s.*”
- 19.2 The first respondent agreed to pay the applicant “*any sum or sums of money which*” the applicant “*may be called upon to pay under the Guarantee/s*” whether or not the applicant “*at such date shall have made such payment.*”
- 19.3 The second respondent bound itself as surety for and co-principal debtor with the first respondent “*for the due payment by*” the first respondent to

⁷ Paragraphs 12 and 25.

the applicant “*of all and any amounts which*” the first respondent “*may be liable to pay to the*” applicant under the deed of guarantee and indemnity.

19.4 By way of its letter dated 8 August 2019, the first respondent made a written request to the applicant, as it was entitled to do in terms of the deed of indemnity, “*to issue a guarantee in the name of FuelEx (Pty) Ltd*” in favour of Engen Petroleum Ltd. The deed of indemnity entitled the first respondent to request the applicant to issue a guarantee on behalf of the first respondent itself, the first respondent’s subsidiary, associated companies “*or any other entity or person.*”

19.5 Upon receipt of the first respondent’s aforesaid written request, the applicant issued a guarantee on behalf of FuelEx (Pty) Ltd in favour of Engen Petroleum Ltd in the amount of R 20 000 000, 00, in accordance with the first respondent’s request and paid that amount to Engen Petroleum Ltd.

19.6 In terms of the deed of indemnity, the first respondent became liable to the applicant in the amount of R 20 000 000, 00 which the applicant guaranteed to pay and did pay to Engen Petroleum Ltd.

19.7 In terms of the deed of suretyship and indemnity, the second respondent became liable to the applicant as surety for and co-principal debtor with the first respondent for the due payment by the first respondent to the applicant

“of all and any amounts which the” first respondent *“may be liable to pay to the”* applicant under the deed of indemnity.

20 Based on the above interpretation of the documentary evidence placed before me and having considered the well-presented arguments by both parties, I am of the view that the second respondent is liable to the applicant in terms of the deed of suretyship and indemnity and that the applicant has proved its case.

21 In the premises, I make the following order:

21.1 The second respondent is ordered to pay the applicant the amount of R 20 000 000, 00 together with interest thereon at the prime overdraft rate of Absa Bank Limited plus 2% with effect from 10 April 2020 to date of payment.

21.2 The second respondent is ordered to pay the applicant’s costs of this application on an attorney and client scale.

KENNEDY TSATSAWANE SC
Acting Judge of the High Court
Gauteng Division, Johannesburg

This judgment was prepared and authored by Acting Judge Tsatsawane. It is handed down electronically by circulation to the parties or their legal

representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 19 January 2024.

Date of hearing: 25 July 2023

Date of Judgement: 19 January 2024.

Appearances:

FOR APPLICANT:

Adv A Kruger
Cell: 083 229 6478
Adrian.k@law.co.za

FOR THE SECOND RESPONDENT:

Adv BL Manentsa
Cell: 084 748 0286
Email: bmanentsa@law.co.za