

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:19418/2022

DOH: 9 MARCH 2023

1.REPORTABLE: **NO**/YES
2.OF INTEREST TO OTHER JUDGES: **NO**/YES
3.REVISED.

.....**31 MARCH 2023**
SIGNATURE**DATE**

In the interlocutory application between:

VEOLIA SERVICES SOUTHERN AFRICA (PTY) LTD
(Registration number: 1964/007768/07)

APPLICANT

and

GUARDRISK INSURANCE COMPANY LIMITED
(Registration number: 1992/001639/06)

RESPONDENT

AJCOR CIVIL PROJECTS (PTY) LTD
(In liquidation)

First THIRD PARTY

MATHINUS PIETER BRITZ

Second THIRD PARTY

ADRIAAN JOHANNES BRITZ

Third THIRD PARTY

MARTIN VAN VEELLEN

Fourth THIRD PARTY

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL / UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 31 MARCH 2023

Bam J

A. Introduction

1. This case is concerned with answering the question whether in terms of the wording of the guarantee the respondent is entitled to withhold payment, based on the various defences I will soon look into, in circumstances where it has received a valid demand from the applicant. The guarantee involved is described as a Retention Money Guarantee (guarantee). Its nature and features will soon be dealt with. It was issued by the respondent on behalf of Ajcor Civil Projects (Pty) Ltd. (in liquidation) in favour of the applicant, on 22 March 2019, under policy number CG/19/04276.

2. On 18 July 2019, the applicant submitted a written demand to the respondent, stating that the contractor was in breach of its obligations and calling up payment under the guarantee. The respondent, being of the view that the applicant had to substantiate its case, replied requesting certain documents, (the requested documents). The record demonstrates that the applicant did not provide the requested documents. The failure to provide the requested documents led to the respondent accusing the applicant of lack of *bona fides*, which accusation later morphed into an allegation of fraud. In short the

respondent withheld payment. In its heads of argument, it states that it will meet only *bona fide*, honest and non-fraudulent claims. However, on the day of argument, and prior to its address, the respondent announced that it had changed its mind and would no longer rely on the defence of fraud. At the eleventh hour, the respondent now sought to buttress its case by placing reliance on an argument founded on suretyship and a further point about a certificate. The pursuit for the requested documents, as will be apparent, still remains the bedrock of the respondent's defence. I begin by introducing the parties and follow up with a high level summary of the background facts.

3. The applicant, Veolia Services Southern Africa (Pty) Ltd. is a company with limited liability, duly incorporated in terms of South African company laws. Its registered office is cited as Golf View Office Park, 13 Pressburg Road, Modderfontein, Gauteng. The applicant has recently undergone a name change from Veolia Water Solutions and Technologies South Africa (Pty) Ltd. The respondent is Guardrisk Insurance Company Limited, a public company incorporated in terms of South African Company laws with its principal place of business situated at The Marc Tower 2, 129 Rivonia Road, Sandton, Gauteng.

B. Background

4. The guarantee was issued in connection with a contract described in the papers as Eikenhof Pumping Station Disinfection Plant, in which the applicant was the contractor while Ajcor was the subcontractor. As such, Ajcor had to supply certain materials to the applicant. Pursuant to an agreement between the applicant and Ajcor, the respondent issued the retention money guarantee (guarantee) in favour of the applicant. On 18 July 2019, the applicant emailed and subsequently hand delivered a written demand to the respondent, on 24 July, calling up payment under the guarantee. A continuation of this

narrative requires that the terms of the guarantee and the demand be considered right away. The pertinent parts of the guarantee read:

'...Whereas the employer and the contractor have agreed that the contractor may provide a guarantee in lieu of the whole or portion of the retention monies provided for under the contract, Now therefore, we...Guardrisk Insurance Company Limited...hereinafter referred to as the surety,

Undertake in accordance with the following provisions, to pay the employer such amounts as the Employer may, from time to time, demand from the surety.

1. Each demand by the employer shall be in writing purportedly signed by the employer and delivered at the Surety's offices at Sandton or such address.. and shall be accompanied by a certificate complying with clause 2 below:
2. The employer's certificate referred to in clause 1 above shall certify:
 - (a) That he is the employer in terms of the contract,
 - (b) That the contractor is in breach of his obligations under the contract
 - (c) That the amount demanded, which amount the certificate shall specify -
 - (i) Does not exceed the amount of retention monies which, but for this guarantee, would have been retained by the Employer in terms of the contract at the date of the certificate, less the amounts previously paid by the surety to the employer in terms hereof, and
 - (ii) Does not exceed a genuine estimate of the cost to the employer of having the breach (referred to in paragraph (b) remedied.
3. The surety shall within 7 (seven) days after its receipt of a demand complying with the provisions of Clauses 1 and 2 make payment to the employer of the amount demanded at such address as the employer shall in writing notify it.
4. Subject to compliance with the provisions hereof, surety's liability to make the payments herein referred to shall be unconditional and shall not be affected or diminished by any disputes, claims or counterclaims between the employer and the contractor.
5. The surety's aggregate liability under this guarantee is limited to R 818 250.98 (amount in words) (hereinafter referred to as the guaranteed amount.) '

5. The demand sent by the applicant reads:

‘Retention Money Guarantee -Policy number...

‘1. With reference to the Retention Money Guarantee, policy number ...

2. The employer (Veolia ...) provides a signed declaration from a director (Appendix A) confirming its status as the employer.

3. The employer confirms that the contractor is in breach of its obligations under the contract.

4. The employer, in terms of clause 2c) of the Retention Money Guarantee demands payment of the full guaranteed amount, namely R 818 250.98...’

5. A detailed reconciliation of the final account between the Employer and the Contractor shows that the Contractor has been overpaid by R 908 169.35 inclusive of VAT.

6. In terms of clause 2 c (i), the employer confirms that the amount does not exceed the amount of retention monies which would have been retained by the employer at the date of the certificate, less the amounts previously paid by the surety to the employer.

7. In terms of clause 2 c (ii) the employer certifies that the amount demanded does not exceed a genuine estimate of the cost due to the employer as a result of the contractor’s default.

8. In accordance with clause 3 of the Retention Money Guarantee, the employer notifies the surety of the following account details to facilitate payment:... [bank details set out]’

6. As I have already indicated, the respondent requested further documents, which were not supplied by the applicant. On 1 April 2022, the applicant launched the present application for relief. Simultaneously with its opposition and a prayer that the application be dismissed, the respondent filed a notice in terms of Rule 13 of the Uniform Rules to join third parties, stating that in the event the court does not agree with its case, it seeks indemnification from the third parties, based on an indemnity agreement executed between it and the third parties.

C. The nature of the guarantee

7. Prior to considering the defences raised by the respondent, it is necessary to first examine closely, the terms of the guarantee. From a plain reading of the words used in the guarantee, the respondent undertakes to pay the employer, from time to time, such amounts as the employer may demand. The only requirements that the employer’s

demand must meet are set out in clauses 1 and 2 of the guarantee. In terms of clause 1, the demand had to be in writing, accompanied by a certificate certifying the items set out in clause 2. Clause 4 of the guarantee makes it plain that apart from compliance with what is set out in the guarantee, the respondent's liability to pay is unconditional. This, immediately suggests that this guarantee is not of the same nature as a suretyship contract. I will soon demonstrate this aspect when I look into the relevant caselaw. Suffice to state that the guarantee establishes a contract between the applicant and the respondent in terms of which the latter undertakes to pay the former unconditionally, upon submission of a demand complying with its terms, it is readily apparent that there is no requirement that the applicant either provide details of the breach by the contractor or substantiate anything to that effect.

8. One of the points raised by the appellants in *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency Soc Ltd (Sanral) and Another*, with reference to a certain clause 2.5 of the construction contract, was that for Sanral to make a call on the performance guarantee, it had to have a factual basis and until such time that such factual basis had been established, Sanral was precluded from demanding payment. For present purposes, I need not canvass the details of clause 2.5, save for mentioning that the clause left it entirely to the employer, (Sanral) to decide whether it considered itself entitled to payment under the guarantee. After carefully analysing clause 2.5, the court, finding for Sanral, remarked:

'Clause 2.5 is to the effect that, for SANRAL to make a call on the performance guarantee, it must act in the *bona fide* belief that it is entitled to payment under the provisions of the agreement. Whether it is in fact so entitled is immaterial at the time that the call is made. There is no suggestion that SANRAL's call is actuated by malice or that its stance, that it is entitled to payment, is far-fetched. Regard must also be had to the purpose for which the performance guarantee was provided, which undoubtedly was to secure SANRAL's position

in the event of a dispute and pending resolution thereof... [28] As stated above, the guarantee is an unconditional one. Its wording is instructive: Lombard was obliged to pay 'on receipt of a written demand' from SANRAL, which could be made if, in SANRAL's 'opinion and ... sole discretion', the Joint Venture had failed and/or neglected to commence the work as prescribed,...'¹

9. In *Minister of Transport and Public Works, Western Cape v Zanbuild Construction*, the court was concerned with two guarantees issued by Absa in favour of the Minister of Transport and Public Works. There, the Minister sought to call up the guarantees on the basis that they were call guarantees, without having established that the department had a claim against *Zanbuild*, the contractor. The court, disallowing the claim and holding that the guarantees were conditional, reasoned:

'Construing the Absa guarantees as a whole, I agree with the view of the High Court that they support the interpretation contended for by *Zanbuild*. In other words, that they do not constitute 'on demand' bonds, but that they give rise to liability on the part of Absa akin to suretyship. The first indicator in that direction is the assertion at the outset that the guarantee 'provide security for the compliance of the contractor's performance of obligations in accordance with the contract'. And in the body of the document the bank guarantees 'the due and faithful performance by the contractor'. This accords with language associated with suretyships.'²

10. From a plain reading of the words used in the guarantee, there can be no question that this guarantee stands on the same footing as a call or demand guarantee and irrevocable letters of credit. It must be paid on its own terms. Far from providing security for the subcontractor's (*Ajcor's*) performance, this guarantee simply states that the respondent's liability to pay is unconditional. That means, it cannot be a suretyship contract, this, notwithstanding the random mentioning of the word surety in certain parts of the guarantee. In *Lombard Insurance Company Ltd v Landmark Holding (Pty) Ltd and others*,

¹ (Case no 577/2019) [2020] ZASCA 146 (13 November 2020), paragraphs 27-28.

² See note 1 *supra* at paragraphs 18-19.

the court, considering the nature of the obligation placed on Lombard, by virtue of a call guarantee, made the following remarks:

'The guarantee by Lombard is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of which is the establishment of a contractual obligation on the part of a bank to pay the beneficiary (seller). This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold.'³

11. Having established the nature of the guarantee in this case, I now turn to the defences raised by the respondent. They are:

- (i) No cause of action
- (ii) *Mala fide*
- (iii) Double benefit

12. Before I deal with the respondent's defences, there is one more matter to mention. In addition to the defence dealing with suretyship, the respondent submitted that it was relying on the defence of failure to comply with the requirements of the guarantee. In this regard, it was submitted, with reference to *Compass Insurance v Hospitality Hotel (756/10)* [2011 ZASCA 149 (26 September 2011)], that the applicant's failure to provide a certificate, as in a separate document, additional to the demand, was fatal to its case. I record that the applicant objected to the latter argument, as this was never the respondent's case. I agree, the point cannot be found anywhere in the respondent's heads.

D. Merits

(i) No cause of action

³ (343/08) [2009] ZASCA 71; 2010 (2) SA 86 (SCA); [2009] 4 All SA 322 (SCA) (1 June 2009) paragraph 20.

13. The respondent says the applicant's cause of action is incomplete in that it does not disclose the event (if any exists) that would entitle it to the retention monies. It is also said that since the applicant did not allege any defect in the contractor's performance, the founding affidavit is fatally defective and unable to sustain a claim. The respondent further claims that the applicant misconstrued the terms of the guarantee. Finally, it is contended that the founding affidavit makes no case, thus, the application ought to be dismissed as the applicant may not make a case in its replying affidavit. I will return to the last two submissions. Not unexpectedly, the applicant says the respondent's statements do not raise triable issues as the guarantee contains no requirement to allege events leading to the breach nor is there an obligation on the applicant to identify defects in the contractor's performance.

14. The applicant is correct. Notwithstanding the respondent's claims that the guarantee creates a contract of suretyship, clause 4 of the guarantee states the contrary. As long as the applicant complies with the requirement of the guarantee, payment must follow. Thus, the terms of the guarantee leave it solely to the applicant, as the employer, to conclude whether it is entitled to call up payment under the guarantee. It goes without saying that the employer must act *bona fide*, just as was said in *Joint Venture*⁴. What is clearly not countenanced by the guarantee is for the respondent to withhold payment solely because, as has happened in this case, it has some hunch that the applicant's claim may not be *bona fide*. I have already said that the respondent abandoned its claim of fraud.

15. With regard to the submission that the applicant has misconstrued the requirements of the guarantee, the following is important. The applicant, in its founding affidavit, made the following averment:

⁴ See paragraph 6 *supra*.

'Payment of the guaranteed sum by the respondent is not conditional on the occurrence of any event other than the receipt of a written demand which complies with the requirements stated in the retention guarantee. It is submitted that the applicant's demand complies with the requirements of the guarantee.'

16. Referencing the averment I have just mentioned, and reading into it that there was no breach, the respondent says the mere fact that the guarantee exists, coupled with the fact that the applicant made a demand for payment, does not give rise to an obligation to pay. It adds that the guarantee was issued for a specific purpose and it only becomes enforceable when a specific event occurs. To hold otherwise, so the argument went, would elevate the guarantee to something akin to a cash payment, which would defeat its commercial purpose.

17. Firstly, these submissions by the respondent conflate the requirements of a conditional guarantee with those of a call guarantee. The guarantee, as I have said, leaves it entirely to the employer to certify that the contractor is in breach. Whether it is in fact so is not the issue. As long as the requirements of the guarantee have been complied with liability to pay is triggered. Secondly, I do not read the applicant's averment to mean that there was no breach. What I understand from the averment is simply that payment as between the applicant and the respondent, is not conditional upon the occurrence of any event. The employer had long certified in his demand that the contractor is in breach. I conclude that this is not a valid defence for the respondent not to pay. As for the statement that the founding affidavit discloses no cause of action, this is as a result of the respondent's reading into the terms of the guarantee additional requirements. The demand as it stands, meets the requirements of the guarantee.

(ii) Demand not *bona fide*

18. The respondent says that the applicant failed to show that it made a bona fide demand for payment in that it refused to provide a reconciliation of the amount claimed from the respondent, despite it mentioning the existence of such reconciliation on several occasions. It is also submitted that there is a factual dispute on the amount of retention monies which the applicant may have kept in terms of the contract and read with the payment certificates. I have already addressed the requirements for payment under the guarantee. The terms of the guarantee do not in any way incorporate the terms of the construction contract. Whatever the terms of the construction contract and how the parties may have decided to give effect to those terms, to which the respondent is not a party, is not relevant for purposes of obtaining payment under the guarantee.

19. The employer in terms of clause 2 c (i) of the guarantee, need only certify that the amount demanded does not exceed the amount of retention monies which, but for the guarantee, would have been retained by the employer in terms of the contract at the date of the certificate, less the amounts previously paid, which has been done. There is no obligation on the applicant to demonstrate anything by reference to the payments certificates. Thus, the submission regarding the existence of a dispute of has no basis. In *Eskom Holdings v Hitachi Power Africa*, it was said:

'In terms of this clause, Eskom is not required to give notice nor is the Bank required to investigate whether notice was given and whether Eskom has complied with the construction contract.... A bank is in the business of handling money, not assessing and evaluating the merits or demerits of contracts...[18]...Eskom in this regard makes no claim for payment under the construction contract, but in exercising a right which it has, under the construction contract, to make demand upon the Bank in terms of the guarantees themselves. Hence the obligation to pay arises from the terms of the guarantee and not from the conditions of the construction contract to which the Bank is not a party. Furthermore the provisions of the guarantees, which gives rise to an entirely separate cause of action to which Hitachi is not a party, do not incorporate, whether by reference or at all, clause 2.5 of the construction contract nor any like provision.'⁵

5 (139/2013) [2013] ZASCA 101 (12 September 2013) at paragraph 15.

(iii) Double benefit

20. The respondent submits, with reference to payment certificates 1 to 5, and to the underlying construction contract, that the guarantee was expressly in lieu of retention monies and may not be claimed where retention monies have already been retained. It says that the applicant is not entitled to the retention money as it had already deducted monies from the contractor in terms of the construction agreement. Finally, a proposition is made that several months have elapsed since the construction was completed and the commercial purpose of the guarantee is no longer a relevant matter. It is submitted that there is no pressing need to determine the respondent's liability without having insight into the grounds of the applicant's claim or its quantum.

21. Other than the certificates themselves, the respondent has no evidence either from the subcontractor or in any other form on whether the retention monies set out in the certificates were in fact deducted nor does it have evidence of how the parties gave effect to the terms of the construction contract. The construction contract, according to the respondent's own version, was concluded in 2017, yet the guarantee was issued only in March 2019. Compelled to provide clarity to these issues, the applicant explained in its replying affidavit that between it and the subcontractor, it was agreed that the retention monies would be released on condition that the subcontractor procures a retention guarantee. Once the guarantee was procured, the retention monies were released to alleviate the subcontractor's cash flow problems. Trenchant criticism was levelled against the applicant for providing the additional details I have just cited in this paragraph, with the respondent claiming that the applicant is precluded from making its case in a replying

affidavit. This is not the applicant's case. For purpose of obtaining payment under the guarantee, the applicant is not required to demonstrate anything with reference to payment certificates or the construction contract. Its case is complete when it has certified the information called for by the guarantee. Thus, there is no merit to the criticism. As to the statements about the commercial relevance of the guarantee and the proposition that the respondent's liability be held in abeyance till the quantum or the applicant's claim is determined, the respondent is not allowed to redraft the terms of the guarantee. A compliant demand has been submitted. The respondent must pay.

E. Discussion on costs

22. The applicant had asked that the court express opprobrium for the respondent's persistence with unmeritorious defences. The respondent may have been misguided in its defences, but there is nothing in its papers that warrants visiting it with a punitive costs order. See in this regard the Constitutional Court's comments in *Mkhatshwa and Others v Mkhatshwa and Others*⁶. There is no basis to award punitive costs.

F. Indemnity from third parties

23. The third party notices were duly served upon the third parties. To date, no notice of intention to defend has been filed. In terms of the notice, the respondent seeks to be indemnified by the third parties in terms of the indemnity agreement executed by the parties in its favour. An order in this regard shall be issued.

G. Order

24. The application succeeds with costs.

(i) The respondent is ordered to pay the applicant an amount of R 818 250.98;

⁶ [2021] ZACC 15 at paragraph 21-23.

- (ii) Interest at the legal rate from a date seven days from date of receipt of the demand to date of final payment
- (iii) The third parties shall indemnify the respondent to the extent provided for in the indemnity agreement.

NN BAM
JUDGE OF THE HIGH COURT,
PRETORIA

APPEARANCES:

APPLICANT'S COUNSEL:

Instructed by:

Adv B H Steyn

R N Incorporated

Wielgers, Pretoria

RESPONDENT'S COUNSEL:

Instructed by:

Adv K Mitchell

Moll, Quibell and Associated

% Prinsloo Bekker Attorneys,

Lynnwood, Pretoria