

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 029956/2022

DOH: 8 May 2023

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

.....05 July 2023
SIGNATUREDATE

In the matter between:

NAD PROPERTY INCOME FUND (PTY) LTD

Applicant

And

GUARDRISK INSURANCE COMPANY LIMITED

First Respondent

**PERFORMANCE AND CUSTOM BOND
SERVICES (PTY) LTD**

Second Respondent

AYESHA MAHOMED AYOB N.O

Third Respondent

DEON MARIUS BOTHA N.O

Fourth Respondent

RALPH FARREL LUTCHMAN N.O

Fifth Respondent

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON CASELINES. THE DATE OF HAND DOWN SHALL BE DEEMED TO BE 05 JULY 2023

BAM J

A. Introduction

1. The applicant seeks to enforce payment guaranteed by an unconditional construction guarantee, against the first respondent. All five respondents oppose the application. Their opposition, in the main, is based on an arbitral award issued on 4 August 2020 in terms of which the applicant, in the context of its relationship with the contractor, made a commitment not to call up the guarantee until such time that its disputes with the contractor, Belo and Kies Construction (Pty) Ltd, (BK) were finally resolved by way of arbitration, including any appeal proceedings. The applicant says the liquidation of BK gave rise to an independent and separate cause of action as provided for in the guarantee. There is according to the applicant no basis in law for the first respondent to refuse payment.

B. The Parties

2. The applicant, NAD Property Income Fund (Pty) Ltd, (NAD) is a private company registered in terms of South African laws. The second respondent, Performance and Custom Bond Services (Pty) Ltd, is a private company also incorporated and

registered in terms of South African laws. BK, (Pty) Ltd (in final liquidation) was liquidated on 29 June 2022. The third to the fifth respondents are the liquidators.

C. Background

3. The context against which the application arises may be summarised thus: The applicant and BK concluded a contract in the style of a Joint Building Construction Contract. Pursuant to the building contract, BK in 2017 arranged to have the guarantee in question issued by the second respondent, on behalf the first respondent, in terms of which the applicant is the beneficiary. Certain disputes arose between the parties which were submitted to arbitration. On 4 August 2020, by agreement between NAD and BK, an interim award was published. The relevant extract of the award reads:

'The respondent [NAD] shall not call on the guarantee, issued in terms of the Acornhoek contract concluded between the claimant [BK] and the respondent, until the final determination of all the disputes between the BK and the respondent in respect of the Dwarsloop and Acornhoek projects which are and/or may be placed before Mr Mahon in the pending arbitration (or any other arbitrator, including any appeal proceedings.)'

Applicant's case

4. Following the liquidation of BK on 29 June 2022, the applicant delivered a written demand through its attorneys on 4 July 2022 to the first respondent. In the demand, and in this application, the applicant relies on clause 5.0 and more specifically 5.2 of the guarantee, which reads:

'5. Subject to the Guarantor's maximum liability referred to in 1.0 or 2.0, the Guarantor hereby undertakes to pay the Employer the guaranteed Sum or the full outstanding

balance upon receipt of a first written demand from the Employer to the Guarantor at the Guarantor's Physical address calling up this Construction Guarantee stating that:

5.1 The agreement has been cancelled due to the Contractors default and that the Construction Guarantee is called up in terms of 5.0. The demand shall enclose a copy of the notice of cancellation; or

5.2 A provisional sequestration or liquidation order has been granted against the Contractor and that the Construction Guarantee is called up in terms of 5.0. The demand shall enclose a copy the court order.'

5. The applicant says it has met the terms of payment of the guarantee and need not prove anything more. It states that the final liquidation of BK is a new and selfstanding trigger entitling it to payment from the first respondent.

Respondents' case

6. In its reply to the demand, the first respondent's response was that the demand is both *mala fide* and opportunistic. This was based on the claim that the disputes between the BK and the applicant have not been finally determined. In this application too, the first and second respondents submit that a proper interpretation of the interim award, with due regard to the context and its apparent commercial purpose, lends itself to the ineluctable conclusion that the application must be dismissed as paragraph 4 is sufficiently broad to preclude a call on the guarantee, for whatever reasons, including the liquidation of BK, pending the outcome of the arbitration. Thus, according to the first and second respondents, the liquidation of BK is of no moment and entirely irrelevant. The award, according to the third to the fifth respondents, echoing the sentiments of the first

and second respondents, effectively amended the applicant's rights to call up the guarantee, hence their call that the application be dismissed. I pause before passing to record that this court was not referred to and is unaware of any authority supporting the last proposition.

D. Legal Principles

7. In *Lombard Insurance Company Ltd v Landmark Holding (Pty) Ltd and others*, Lombard had paid the employer, the Academy, thereafter, relying on residual indemnity and suretyship contracts, sued the respondents. On appeal, the court began by remarking that the court *a quo* had interpreted the guarantee with reference to the contract (the underlying construction contract) and in so doing concluded that there was no obligation to pay on either respondent. In upholding the appellant's claim and finding that the court *a quo* had erred, the court remarked:

'In my view the court below misconstrued the nature of the guarantee and the indemnities provided by the three respondents. The terms of the guarantee by Lombard referred to in paras 2, 3 and 4 above are clear. The guarantee creates an obligation to pay upon the happening of an event. The guarantee itself records that reference to the construction contract is solely for the purpose of convenience and that there is no intention to create an accessory obligation or suretyship. Clause 14.5 of the construction contract merely records that security exists in respect of the contractor's obligations. The guarantee was to protect the Academy in the event of default by Landmark and **it is to the guarantee that one should look to determine the rights and obligations of the Academy and Lombard.**¹ (The emphasis is mine.)

¹ (343/08) [2009] ZASCA 71; 2010 (2) SA 86 (SCA); [2009] 4 All SA 322 (SCA) (1 June 2009), paragraph 19.

8. In *Eskom Holdings v Hitachi Power Africa*, Hitachi launched an urgent application for an interdict founded on two bases. The first was the alleged failure on the part of Eskom to comply with the terms of the construction contract, and the second, on the breach of promise made by Eskom that it would not present the guarantees prior to 28 February 2013. Hitachi succeeded in the court of first instance but on appeal, the court found in favour of Eskom as shown in this extract:

'...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 give 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.'

9. In *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association*, the respondent, ELOH had unsuccessfully raised an exception in an interlocutory application, resisting Coalface's defence which was based on the underlying construction contract. Buoyed by the success in the interlocutory phase, Coface applied before the hearing of the main application to amend its plea to introduce various defences dealing with, *inter alia*, the contractor's liability. The application was dismissed. In the process of finding for the respondents, on appeal, the court held:

'In deciding the application to amend Lamont J had regard to the purpose of a construction guarantee, namely, to enable the person relying thereon to readily obtain payment by production of the required documents. Put simply, he held that a guarantee of the kind under consideration was enforceable according to its terms. The

introduction of **extraneous issues as a defence is precluded, save for very limited exceptions like fraud...** (emphasis supplied)

10. The court went further and underscored the importance of allowing financial institutions to honour guarantees and letters of credit with as little judicial interference, with reference to *Loomcraft Fabrics CC v Nedbank Ltd & another*, stating:

‘...The importance of allowing banks to honour their obligations under irrevocable credits without judicial interference has been repeatedly stressed in subsequent cases. In *Intraco Ltd v Notis Shipping Corporation (The Bhoja Trader)* [1981] 2 Lloyd’s Rep 256 (CA) Donaldson LJ, after upholding the refusal of the Court below to interfere with the seller’s right to call upon a bank to make payment under its guarantee where fraud was not involved, observed at 257:

“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.”

11. It is against the established legal principles as adumbrated in this judgement that the defences raised by the respondents must be tested. The defences may be crystallised thus:

11.1 By agreeing to the award, the applicant and BK agreed that their disputes will be determined first, before the guarantee may be called. The award is clear and unambiguous.

11.2 The settlement between the two parties, the applicant and BK was concluded in contemplation of the possible liquidation of BK.

11.3 The liquidation of BK may have interrupted the pending arbitration but did not put an end to any disputes;

11.4 The liquidation of BK does not mean that it is indebted to NAD.

11.5 NAD must be held to the agreement it concluded with BK.

11.6 It is absurd of the applicant to conduct itself (in calling up payment) as though the award does not exist.

12. The defence in essence is that the applicant must be held to the underlying agreement with BK and not be allowed to call up payment under the guarantee. The defence, as I shall show, is not cogent. As a start, I refer to the relevant paragraph 5 .2 of the guarantee.

13. The guarantee as the decisions of *Lombard, Eskom v Hitachi, Coaface* and more inform, is payable on its terms. The terms of the guarantee also establish a separate and distinct cause of action and it does not admit of extraneous defences such as suggested by the respondents. In this case, that separate and distinct cause of action is the liquidation of BK. That there may still be disputes that must be resolved is entirely irrelevant to the requirements of calling up payment under the guarantee. It follows that the extraneous agreement is no defence to the applicant's call for payment. The applicant has met the terms required for payment and it must be paid. It is likewise no defence to say, as argued by the respondents, that the award was issued in contemplation of the liquidation of BK. This point, in fact supports the applicant's cause as it may be inferred that notwithstanding the contemplated liquidation, the parties still chose not to include the liquidation in the award.

14. In any event, the applicant could not, of its own accord amend the terms of the guarantee without involving the first respondent. That much is clear from the guarantee itself. The first respondent is also not a party to the undertaking which was eventually turned into an award. The respondents rely on the remarks of the court in *Kwikspace Modular Buildings Ltd v Sabodala Mining Company Sarl and Another*, where it was said that in Australian law, a contractor may, without alleging fraud, restrain a beneficiary of an unconditional guarantee from calling up payment and hold them to a term of an underlying covenant, if doing so would breach a term of such underlying contract.

15. The respondents appear to overlook that the court was dealing with a contract steeped in Western Australian law and had to be interpreted according to Australian law. That was a provision of the contract. They also ignore that the court was quick to underscore that the Australian position is not the same as South African law, as seen in the passage here below:

'I expressly refrain from considering whether, in view of the decision of this court in *Loomcraft Fabrics CC v Nedbank Ltd & another* (which dealt with a letter of credit) and the English decisions referred to therein, in particular the decision of the English Court of Appeal in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* (where Lord Denning MR and Browne LJ both said that a performance guarantee is akin to a letter of credit), there is any room for a contention that the position in South Africa should be the same as in Australia.'²

16. The respondents further rely on the remarks of the court in *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African*

² (173/09) [2010] ZASCA 15; [2010] 3 All SA 467 (SCA) ; 2010 (6) SA 477 (SCA) (18 March 2010), paragraph 11 and 12.

*National Roads Agency Soc Ltd and Another*³. Here too the court was clear that the claims made by Joint Venture were not reflective of the current South African law and in support of the latter position, it went ahead and dismissed the appeal in favour of SANRAL, demonstrating what has always been the South African legal position, that the guarantee in that case was payable on its terms.

17. In short, there is no merit to any of the defences. The application must succeed with costs.

E. ORDER

18. The application succeeds.

18.1 The first respondent shall pay to the applicant the amount of R 15 179 698.26, together with interest calculated from a date seven days from date of demand to date of final payment.

18.2 The respondents are held jointly and severally, to pay the applicant's costs

N.N BAM
JUDGE OF THE HIGH COURT,
PRETORIA

Date of Hearing: 08 May 2023

Date of Judgement: 05 July 2023

Appearances:

³ (Case no 577/2019) [2020] ZASCA 146 (13 November 2020), paragraph 17.

Applicant:

Adv J Voster

Instructed by:

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First and Second Respondents:

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