IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 441/06
Reportable

In the matter between:

LOMBARD INSURANCE COMPANY LIMITED APPELLANT

and

CITY OF CAPE TOWN RESPONDENT

CORAM:	**HOWIE P, MTHIYANE, CLOETE, COMBRINCK JJA et MHLANTLA AJA**
HEARD:	**15 AUGUST 2007**
DELIVERED:	**21 SEPTEMBER 2007**
SUMMARY:	**Interpretation of a guarantee.**
NEUTRAL CITATION:	**This judgment may be referred to as *Lombard Insurance v City of Cape Town* [2007] SCA 112 (RSA)**

J U D G M E N T

MHLANTLA AJA

MHLANTLA AJA

[1] This is an appeal, with the leave of this court, against the judgment and order of the Cape High Court, in which Davis J ordered the appellant to pay to the respondent the sum of R297 806.16 together with interest thereon at a rate of 15,5 per cent per annum as well as the respondent's costs.

[2] During December 1999, the respondent's predecessor in title, the Cape Metropolitan Council ('CMC'), issued a tender for civil engineering construction works for the control of odours and upgrading of the primary sludge removal system and associated civil works for the Cape Flats Waste Water Treatment Works defined as contract no WW38/99. On 13 January 2000 a joint venture between Labor Construction Company (Pty) Ltd ('Labor') and South African Focus Projects ('SA Focus') submitted a tender to perform the works.

[3] On 9 February 2000, Gibbs Africa Consulting Civil Engineers ('Gibbs Africa'), acting on behalf of CMC, notified the Labor/SA Focus joint venture in writing of the award of the tender as well as the conditions attaching thereto. These included the submission by the joint venture of an institutional guarantee as well as proof of insurance.

[4] The appellant, Lombard Insurance Company Limited, had previously issued a guarantee on behalf of Labor in respect of a contract between Labor and CMC and had maintained a risk profile on Labor. On 10 February 2000 Labor submitted an application to the appellant for the issue of an institutional guarantee in respect of the tender.

[5] On 17 February 2000, the appellant issued an institutional guarantee in favour of CMC. The guarantee recorded that Labor, referred to in the guarantee as 'the contractor', had entered or was about to enter into a contract with CMC for the contract no WW38/99. The appellant undertook to pay the sum of R297 806.16 in the event of Labor, inter alia, failing to proceed with and complete the works or being placed under provisional or final liquidation or judicial management. It is this guarantee that is in issue.

[6] On 26 May 2000, a written joint venture agreement was concluded between Labor and SA Focus to undertake the works under contract no WW38/99. Clause 5 of the agreement provided that Labor would provide the financial resources for the execution of the work, including the institutional guarantee as required in terms of the contract, and that SA Focus would provide the management team and labour resources required on site.

[7] On 9 June 2000, CMC and the joint venture concluded a written civil engineering contract, whereafter the works commenced. On 22 June 2001 Labor was placed under provisional liquidation. CMC thereafter demanded payment of the guaranteed amount from the appellant, which in turn denied liability, stating the following in a letter dated 28 August 2001:

'At all relevant times, we were under the impression that the contract was to be concluded with Labor Construction Company (Pty) Ltd and we were not aware of the fact that the contract was in fact to be concluded with the joint venture. This is borne out by the fact that our guarantee refers only to Labor Construction Company (Pty) Ltd. In view of the fact that the contract was not awarded to Labor Construction Company (Pty) Ltd but rather to a joint venture, it is our contention that we are not liable in terms of the guarantee.'

[8] The plaintiff (now respondent) thereafter instituted an action claiming payment of the guaranteed sum. The appellant pleaded that contract no WW38/99 was not entered into between Labor and CMC but rather between

CMC and a joint venture. It further pleaded that it had issued a guarantee to cover Labor's performance only and that accordingly, it was not indebted to the respondent.

[9] During the trial the respondent did not adduce any oral evidence, merely placing documents before the trial court upon which it relied. The appellant called Ms Catharina Belcher, its general manager, who outlined the policies and procedures adopted by it when considering applications for the issue of guarantees.

[10] At the conclusion of the trial, Davis J made a finding in favour of the respondent. He held as follows:

'In my view, the wording of the contract for an institutional guarantee concluded between Labor and the defendant is more than capable of a construction to the effect that the intention of such an agreement was to indemnify the obligations of Labor. No legal principle was raised by the defendant which would run counter to this conclusion. One of the express purposes of the guarantee was to protect CMC in the event that Labor was liquidated or placed into judicial management. Given that this interpretation of the contract is both plausible and indeed reasonable, it is my view, that plaintiff was entitled to payment in terms of the guarantee.'

[11] The main issue on appeal is the proper interpretation of the guarantee. Simply put, what was the guarantee?

[12] Counsel for the appellant submitted that the guarantee was issued to cover the due performance of Labor in respect of the contract in the event that Labor concluded the contract with CMC. The contract was, however, concluded between CMC and a joint venture. Counsel contended that the appellant was not liable as the condition governing the guarantee had not been fulfilled; furthermore that the joint venture had not yet been formed when the

guarantee was issued. Counsel argued in the alternative that the guarantee was void *ab initio* as there was no consensus between the parties.

[13] Counsel representing the respondent conceded that it would have been preferable to obtain a guarantee covering the joint venture. He submitted, however, that the respondent was entitled to rely on the guarantee even though the contract contemplated in the guarantee was not concluded between CMC and Labor as sole contractor, but between CMC and a joint venture of which Labor was a partner.

[14] I turn now to consider the proper construction to be placed on the guarantee and, in particular, to the question whether the guarantee is capable of being extended to cover a contract entered into by the respondent and a joint venture in which Labor was a partner.

[15] In my view, the grammatical and ordinary meaning of the language of the guarantee is clear and unambiguous. It is evident therefrom that the appellant guaranteed due performance by Labor, in the event of Labor being the contractor in a contract it concluded with CMC. Theoretically it would have been possible, as the court a quo pointed out, for the appellant to have guaranteed the obligations of Labor in terms of the joint venture. But I am quite unable to give the guarantee that meaning. What the appellant guaranteed was the performance of the contractor's obligations. The contractor was defined as Labor. The guarantee envisages that 'the contractor' ie Labor, and (by implication) only Labor, would complete 'the works' defined as contract no WW38/99 – not that the works would be completed by another unnamed person. There can be no doubt that, on a proper interpretation, the guarantee covered Labor and not the joint venture.

[16] It is accordingly clear that the cause of action is based on a guarantee being claimable in the event that Labor concluded a contract with the respondent. The guarantee covered various eventualities provided the contract was between Labor and CMC. The contract was however concluded between CMC and the joint venture of which Labor was a partner.

[17] It was submitted on behalf of the respondent that the only material requirement for the appellant to be liable in terms of the guarantee is that Labor must have entered into a contract with CMC and that the capacity in which Labor contracted with CMC is not relevant.

[18] This submission is, in my view, without merit. The appellant undertook to guarantee the obligations of 'the contractor' as defined, and not the obligations of a contracting party (whomsoever that might be) on whose behalf Labor would enter into the contract. It has to be borne in mind that the obligations of a partnership and those of the individual partners in their personal capacities are not, in the absence of an agreement, interchangeable. See *Standard Bank of S.A. Ltd v Lewis*.[1]

[19] In my view, the learned judge erred when he held that, because Labor was a partner in the joint venture, it was therefore a party to the contract. I consider that the court a quo should as a starting point, have attempted to determine the intention of the parties to the guarantee. It was never the intention of Labor and the appellant to extend the guarantee to cover Labor's performance as a partner in a joint venture. That would be going beyond the language of the guarantee.

[1]1922 TPD 285 at 289, 293 and 295.

[20] Even if it be accepted that the guarantee was ambiguous, in that it could as a matter of linguistic construction be interpreted to cover either Labor's obligations as a sole contractor or Labor's obligations even if it was not the sole contractor, the background circumstances show that this latter meaning could never have been intended by the parties: not by Labor, because its obligations to CMC and to SA Focus were to obtain a guarantee for the obligations of both partners to the joint venture; not by the appellant, because the appellant was unaware of the existence of SA Focus; and not by CMC because it required a guarantee covering the obligations of the joint venture, not one of the partners in the joint venture.

[21] It is accordingly evident that the appellant did not undertake to secure the obligations of the joint venture or of Labor as a partner in a joint venture. The guarantee covered Labor as a sole entity. It follows therefore that the appellant cannot be held liable for the obligations of the joint venture.

[22] This conclusion renders it unnecessary to decide the defence of mutual mistake raised by the appellant.

[23] As regards the question of costs, counsel for the respondent contended that the matter did not warrant the employment of two counsel. I do not agree. In my view this matter is of importance not only to the insurance industry but to local authorities as well. It raises issues on how to deal with guarantees of this kind in future and there are public policy considerations to be borne in mind. I am satisfied that the matter warranted the employment of two counsel.

[24] In the result, the following order is made:

24.1 The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.

24.2 The order of the court a quo is set aside and substituted with the following order: ‘The action is dismissed with costs’.

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N Z MHLANTLA
ACTING JUDGE OF APPEAL

CONCUR:

HOWIE P)

MTHIYANE JA)

CLOETE JA)

COMBRINCK JA)