THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 108/13
Reportable

In the matter between:

NEDBANK LTD — **FIRST APPELLANT**
TOP CD (MENLYN) (PTY) LTD — **SECOND APPELLANT**

and

PROCPROPS 60 (PTY) LTD — **RESPONDENT**

Neutral citation: *Nedbank v Procprops* (108/13) [2013] ZASCA 153 (20 November 2013).

Coram: Brand, Maya, Bosielo and Leach JJA and Van der Merwe AJA

Heard: **5 November 2013**

Delivered: **20 November 2013**

Summary: Banker ─ payment guarantee ─ interpretation ─ provision requiring delivery to bank of original guarantee with first demand for payment ─ only one payment by bank provided for.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Ledwaba J sitting as court of first instance):

1 The appeal is upheld and the respondent is ordered to pay the costs of appeal of both the appellants.

2 The order of the court a quo is set aside and replaced with the following:

'The plaintiff's action is dismissed and the plaintiff is ordered to pay the costs of the defendant and the third party.'

JUDGMENT

VAN DER MERWE AJA (BRAND, MAYA, BOSIELO AND LEACH JJA CONCURRING):

[1] This appeal concerns the interpretation of a letter of guarantee (the guarantee). The guarantee was issued by the first appellant, Nedbank Ltd (Nedbank) to the respondent, Procprops 60 (Pty) Ltd (Procprops) at the instance of the second appellant, Top CD (Menlyn) (Pty) Ltd (Top CD).

[2] The relevant factual background of the matter is common cause. On 7 May 2009 Procprops and Top CD concluded a written agreement (the lease) in terms of which the premises situated at shop G75 and G77, Ground Floor, Parkview Shopping Centre, Corner of Garsfontein and Netcare Roads, Moreleta Park Extension 80, Pretoria were let by Procprops to Top CD for a period of ten years and seven months commencing on 1 July 2009. Clause 49 of the lease obliged Top CD to furnish a bank guarantee to Procprops in an amount calculated in terms of that clause. Clause 49.3 entitled Procprops, in its sole and absolute discretion at any time during the period of the lease or its renewal, to call up the guarantee for payment of any amount which Top CD was indebted to it.

[3] In consequence Top CD arranged with Nedbank for the issue of the guarantee to Procprops. As required by Nedbank, Top CD indemnified Nedbank in respect of any payment made in terms of the guarantee. Nedbank issued the guarantee on 28 July 2009. The guarantee records that Procprops and Top CD had entered into the lease and that in terms thereof Top CD was required to furnish Procprops with a letter of guarantee. It then proceeds as follows:

'3. At the instance of the lessee we, the undersigned DAVID ALEXANDER WATSON and ANNELI TERBLANCHE in our respective capacities as CREDIT MANAGER and BUSINESS MANAGER of NEDBANK LIMITED REG NO 1951/000009/06 (hereinafter referred to as the "bank") of **Nedhill Office Park, 665 Duncan Road, Cnr Duncan and Lunnon Streets, Hillcrest, 0083**, duly authorised thereto, hold at the landlord's disposal and undertake to pay to the landlord an amount not exceeding **R313 845,53** (**THREE HUNDRED AND THIRTEEN THOUSAND EIGHT HUNDRED AND FORTY FIVE RAND, FIFTY THREE CENTS**), subject to the terms and conditions stated below.

4. Payment shall be made upon receipt by the bank, at its address stated in clause 3 above, of the landlord's first written demand, which written demand shall be accompanied by this original guarantee and which will state that the lessee had failed to comply with its obligations in respect of the lease and that, accordingly, the amount of **R313 845,53** (**THREE HUNDRED AND THIRTEEN THOUSAND EIGHT HUNDRED AND FORTY FIVE RAND, FIFTY THREE CENTS**), or any lesser portion thereof, is now due and payable. In the event that the branch mentioned in clause 3 above closes for whatsoever reason, this guarantee may be presented at any other branch of the bank.'

[4] In terms of the lease the rental was payable monthly in advance on the first day of each calendar month. Top CD paid rental in terms of the lease up to 1 December 2010 but vacated the premises during December 2010 and made no further payment of rental. Top CD alleged that it cancelled the lease either as a result of fraudulent misrepresentations on the part of Procprops or by accepting Procprops's repudiation. According to Procprops it cancelled the lease only at the end of December 2011 as a result of the breach of the lease by Top CD. These allegations are issues in separate litigation between Procprops and Top CD.

[5] By letter dated 13 January 2011 Procprops demanded payment of the amount of R72 693.66 from Nedbank in terms of the guarantee. In this letter of demand it was stated that Top CD had failed to comply with its obligations in respect of the lease and that accordingly the said amount was due and payable. This amount represented only the rental payable on 1 January 2011. The letter was accompanied by the original guarantee and concluded as follows:

'Could you also please consider the fact that this letter calls upon you to perform only partially in terms of the guarantee and accordingly our client's rights in respect thereof are not extinguished. Could you please in view thereof return the original guarantee to us to enable our client to call on the guarantee should it become necessary in future.'

[6] On 21 January 2011 Nedbank duly paid the amount of R72 693.66 to Procprops, but did not respond to the request for the return of the original guarantee. On 7 February 2011 Procprops sent a further letter of demand to Nedbank. In this letter payment in terms of the guarantee of a further amount of R72 693.66 was demanded. Apart from the fact that payment of a further amount was claimed, the contents of this letter were identical to that of the first demand of 13 January 2011. This letter of demand was of course not accompanied by the original guarantee. Without having received any response from Nedbank, Procprops demanded payment of yet a further amount of R72 693.66 in terms of the guarantee by letter dated 1 March 2011. To both letters of demand dated 7 February 2011 and 1 March 2011, Nedbank responded on 14 March 2011 in the following terms:

'Please note that Nedbank did perform in terms of the guarantee in favour of your client, when we received your first written demand dated January 2011, accepted return of the original guarantee and duly paid the amount demanded. The guarantee has been cancelled and we are of the opinion that all obligations in terms thereof have been extinguished.'

[7] Despite this, on 16 May 2011 Procprops made written demand for payment under the guarantee from Nedbank in the amount of R241 151.87, representing the difference between the amount mentioned in the guarantee

(R313 845.53) and the amount of the payment (R72 693.66). When Nedbank did not make payment of this amount, Procprops instituted action in the North Gauteng High Court against Nedbank for payment in accordance with the letter of demand of 16 May 2011. Nedbank's plea to this claim was essentially that when it made payment to Procprops on the first demand, its obligation in terms of the guarantee had been discharged. Nedbank also joined Top CD as a third party to the action, relying on the aforesaid indemnification. Top CD in turn admitted that it was liable to indemnify Nedbank for any amount that Nedbank might be ordered to pay to Procprops, but joined forces with Nedbank on the question of the interpretation of the guarantee.

[8] The matter was heard by Ledwaba J. At the end of the trial he gave judgment for Procprops against Nedbank in the amount claimed as well as interest thereon, and ordered Nedbank and Top CD jointly and severally to pay the costs of Procrops. He however granted leave to both Nedbank and Top CD to appeal to this court.

[9] It is clear that the guarantee has the features described by Scott AJA in *Loomcraft Fabrics CC v Nedbank Ltd & another* 1996 (1) SA 812 (A) at 815G-J. It established a contractual obligation on the part of Nedbank to pay to Procprops which is wholly independent of the underlying lease between Procprops and Top CD. Disputes arising between Nedbank's customer (Top CD) and Procprops in relation to the lease, did not detract from Nedbank's obligation to make payment to Procprops provided only that the conditions for payment specified in the guarantee were met. These conditions were the receipt by Nedbank at its specified branch of a written demand with the contents set out in paragraph 4 of the guarantee and the original guarantee. In the event of these documents being so presented, Nedbank could escape liability only upon proof of fraud on the part of Procprops. See also *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others* 2010 (2) SA 86 (SCA) para 20 and *Firstrand Bank Ltd v Brera Investments CC* 2013 (5) SA 556 (SCA).

[10] The central issue is whether on a proper interpretation of the guarantee it provided for more than one payment by Nedbank. The provision that the demand must be accompanied by the original guarantee strongly indicates that only one payment was envisaged. The purpose of this provision could not have been to provide Nedbank with an original guarantee or to have a record of its terms. In all likelihood, it already had one of its own. The purpose of the provision must therefore have been for Procprops to give up the security of the guarantee to ensure that it could not be presented for payment again. In addition, a meaning must be ascribed to the phrase 'first demand'. In my view the phrase excludes further demands. In context it therefore means that there could be no second or subsequent demand in terms of the guarantee. In my judgment the guarantee is unambiguous and clear. Nedbank was only entitled and obliged to make payment of the amount of R313 845.53 or any lesser portion thereof upon receipt at its prescribed branch of Procprops' first written demand and the original guarantee. It follows that Nedbank's obligation in terms of the guarantee was discharged when it made payment of a lesser amount of R72 693.66 on 21 January 2011 pursuant to demand and the return of the guarantee.

[11] Counsel for Procprops attempted to save the day by relying on the last part of the demand quoted in para 5 above, namely the request by Procprops that after payment of the first demand Nedbank should return the guarantee to enable Procprops to call on the guarantee should it become necessary in future. Counsel wisely disavowed any reliance on the proposition that a new contract was entered into. As I understood it, the argument was that both Procprops and Nedbank understood the guarantee in this manner and that it should therefore be given this meaning.

[12] This argument is untenable. Evidence of subsequent conduct of parties to an agreement is only admissible when the document is ambiguous on the face of it. See *Coopers and Lybrand & others v Bryant* 1995 (3) SA 761 (A) at 768C-E. As I have said, the meaning of the guarantee is plain and unambiguous. There is in any event no evidence that Nedbank ever held the belief that Procprops attempts to ascribe to it. The evidence is to the contrary.

By 19 January 2011, that is after receipt of the first demand but before actual payment thereof, an internal instruction to cancel the guarantee had been issued by Nedbank. There was no duty on Nedbank to advise Procprops of the correct interpretation of the guarantee but it nevertheless did so on 14 March 2011.

[13] It follows that the appeal must succeed. Counsel were agreed that in this event Procprops should be ordered to pay the costs of both Nedbank and Top CD, both in this court and in the court below. Although Nedbank was represented before us by two counsel, it did not ask that the costs of two counsel be allowed.

[14] In the result the following order is issued:

1 The appeals are upheld and the respondent is ordered to pay the costs of appeal of both the appellants.

2 The order of the court a quo is set aside and replaced with the following:

'The plaintiff's action is dismissed and the plaintiff is ordered to pay the costs of the defendant and the third party.'

C H G VAN DER MERWE
ACTING JUDGE OF APPEAL

APPEARANCES:

For First Appellant:	G W Girwood (with him M Seape)
	Instructed by:
	Cliffe Dekker Hofmeyr, Pretoria
	Webbers Attorneys, Bloemfontein
For Second Appellant:	H F Oosthuizen
	Instructed by:
	Eloff Brink Attorneys, North Wing
	Symington & De Kok, Bloemfontein
For Respondent:	W W Gibbs
	Instructed by:
	Gross Papadopulo & Associates, Pretoria
	Lovius Block, Bloemfontein