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Hollard Insurance Company Limited v Lynco Projects (Pty) Limited and Others (1173/2023) [2024] ZAMPMBHC 86 (17 December 2024)

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THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 1173 / 2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: **17 December 2024**

SIGNATURE

In the matter between:

THE HOLLARD INSURANCE COMPANY LIMITED **APPLICANT**

And

LYNCO PROJECTS (PTY) LIMITED **FIRST RESPONDENT**

VISSER, COENRAAD FREDERICK **SECOND RESPONDENT**

VISSER, SARA ADIANA MARGRITA **THIRD RESPONDENT**

LINDA, JOSEPH GIDEON **FOURTH RESPONDENT**

LINDEQUE, BRUCE HEREMIA **FIFTH RESPONDENT**

LINDEQUE, COULETTE **SIXTH RESPONDENT**

LINDEQUE, MICHEAL **SEVENTH RESPONDENT**

JUDGMENT

RATSHIBVUMO DJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 17 December 2024.

[1] Introduction

This is an application in which the Applicant seeks an order in the following terms:

1.1 Payments of the sum of R2 770 029.30 (two million, seven hundred and seventy thousand and twenty-nine rand and thirty cents).

1.2 Interests thereon at the prescribed prime interest rate of 10% from the 22nd of August 2019 until repayment in full.

1.3 Costs of suit on the attorney and client scale.

1.4 Further and alternative relief.

[2] The Applicant already secured a judgment against the Second, Third and Fourth Respondents who did not oppose the application. The current application is therefore against the First, Fifth, Sixth and Seventh Respondents (the Respondents). The application is opposed by the Respondents.

[3] Background.

The facts giving rise to this claim are largely common cause. The Applicant is in the business of, *inter alia*, issuing guarantee policies, in which the performance of debtors in respect of their credit policies is guaranteed. It does this in respect of suppliers and distributors within the fuel procurement industry and secure such obligations under the guarantees by obtaining indemnities, suretyships and other tangible security in its favour.

[4] One such guarantee was issued following a contract entered into between the Applicant and the First Respondent on 07 September 2015, when the First Respondent, represented by the Seventh Respondent, executed a counter indemnity (the Indemnity), in favour of the Applicant, in terms of which: -

4.1 The Applicant agreed to enter into certain guarantees and taking suretyships in favour of certain persons, companies, local, provincial and government authorities or other bodies for the due payment by the First Respondent of any monies now or from time to time, hereafter owing by the First Respondent for the due performance by the First Respondent’s obligations under any contracts which it may have entered into or may hereafter enter into.

4.2 The First Respondent further undertook and agreed to indemnify and keep indemnified the Applicant and to hold it harmless from and against all claims, losses, liabilities, demands, cost and expenses of whatsoever nature which the

Applicant may sustain at any time or incur by reason or in consequence of having executed or hereafter executing any guarantees on behalf of the First Respondent.

4.3 The First Respondent further undertook and agreed to pay the Applicant, on demand any sum or sums of money which the Applicant may be called upon to pay under the guarantees, irrespective of whether the Applicant at such date shall have made such payment or not, and whether or not, the First Respondent admits the amount of such claim against the Applicant.

4.4 The First Respondent further agreed that it is liable to the Applicant for payment of interest on any sums of money which the Applicant may pay under the guarantees from date of payment by the Applicant, until repayment at a rate equal to the prime overdraft rate of ABSA Bank Limited, plus 2%.[1]

[5] On the same date in which the Indemnity was signed (in respect of the Second to the Fourth Respondents) and on 16 September 2016 (in respect of the Fifth to Seventh Respondents), the Second to Seventh Respondents (the sureties) and their spouses where applicable, signed and executed Deeds of Suretyship and Indemnity in favour of the Applicant. In terms of the Deeds of Suretyship, the sureties agreed to bind themselves as sureties and co-principal debtors, jointly and severally with the First Respondent *in solidium* for the due payment by the First Respondent to the Applicant on demand of any amounts which the First Respondent may be liable to pay the Applicant under the indemnity.

[6] The sureties further indemnified the Applicant against all and any claims, losses, demands, liabilities, costs and expenses of whatsoever nature which the Applicant may sustain or incur by reason or in consequence of having executed or hereafter executing any guarantees. The sureties further undertook and agreed to pay the Applicant on demand any sum or sums of money which the Applicant may be called upon to pay under the guarantees, irrespective of whether the Applicant at such date shall have made such payment or not, and whether or not, the sureties admit the validity of such claim against the Applicant under the guarantee.[2]

[7] On 22 August 2019, the Applicant issued the aforementioned guarantee in favour of Sasol Mining (Pty) Ltd (the beneficiary or Sasol) on behalf of the First Respondent, in the amount of R2 770 029.30. Subsequent to the issue of this guarantee, and on 20 December 2021, the Applicant received a written demand from the beneficiary under the guarantee, for payment of R2 770 029.30. The Applicant obliged and made a payment in the amount of R2 770 029.30 to the beneficiary on 07 January 2022.

[8] The Respondents failed or neglected to make the payment of the amount paid to the beneficiary, plus interest, despite demands made by the Applicant. It is for this reason that this application was launched.

[9] Respondents' defence.

As indicated above, the Respondents are opposing the application. In an answering affidavit deposed on their behalf, they raise a point *in limine* questioning the authority of the deponent to the founding affidavit, given the fact that he did not acquire confirmatory affidavit from the parties who signed the indemnity and deeds of suretyship, on behalf of the Applicant, and from their instructing attorneys.

[10] Over and above the point *in limine* raised, the Respondents raise a defence on merits being the impossibility in project performance. According to the answering affidavit, the First Respondent was awarded a contract by Sasol for the project of construction of a water pipeline known as Charl Cilliers water pipeline 450602408 at Charl Cillier community. The project was commenced with, but the First Respondent was forced to abandon after members of the local community hampered their efforts. This they did after they were unhappy at the contract being awarded to the First Respondent and/or the First Respondent's failure to employ members of the local community whom they demanded should be hired, for the project.

[11] When the First Respondent could not meet the demands of the local community, its employees were intimidated, their equipment was stolen and/or hijacked, while the installed pipelines were vandalised. The First Respondent brought this predicament to the attention of Sasol's project manager who negotiated a truce with the local community, which truce was

short-lived before the unrests erupted again. Sasol deployed the security officers who were just not capable to offer the First Respondent a lasting protection. The police were also informed about the situation but could not stop it. It therefore became impossible for the First Respondent to perform its task, forcing it to terminate its contract with Sasol, which it did on 14 October 2021. For these reasons, the Respondents ask that the application should be dismissed with costs.

[12] Point *in limine*.

The point *in limine* raised by the Respondents, suggests that it is only the persons who signed the contract that can have the requisite personal knowledge to initiate litigation. This assumption flies in the face of common practice when it comes to corporate entities such as the banks when it relates to the requisite personal knowledge of the facts upon which the plaintiff's claims are based. First-hand knowledge of every fact which goes to make up the plaintiff's cause of action is not required and where the plaintiff is a corporate entity, the deponent may well legitimately rely for his or her personal knowledge of at least certain of the relevant facts and his or her ability to swear positively to such facts, on records in the company's possession.***[3]*** As Herbstein and Van Winsen put it, “where the plaintiff is a corporate entity the deponent may well legitimately rely for his personal knowledge of at least certain of the relevant facts and his ability to swear positively to such facts, on records in the company's possession.”**[4]**

[13] The deponent to the founding affidavit averred that he is employed by the Applicant in the capacity as Head of Guarantees. He further stated, “[I]n my aforesaid capacity, I am duly authorised to represent the Applicant in these proceedings and to depose to this affidavit on behalf of the Applicant. A copy of the resolution by the Applicant evidencing the aforesaid is annexed hereto as annexure FA1… The facts as set out herein fall within my personal knowledge and belief, unless the contrary is indicated by the context thereof and are both true and correct… In addition to my knowledge as stated above, I have at my disposal all the records and documents in relation to the subject matter hereof which I expound upon more fully below.”

[14] The Respondents could not and did not attempt to dispute the above averments made by the Applicant, save to say that the deponent was not a signatory to the contract. It is common cause that he did not sign the indemnity himself as it’s almost always the case when it comes to deponents to founding affidavits on behalf of the corporates such as the banks. The assertions to the effect that evidence presented by the Applicant is hearsay, cannot be sustained. I therefore accept that the deponent to the founding affidavit had personal knowledge that he gathered by virtue of his position in the Applicant and having read the records held by it. The factual background for which he alleged to have personal knowledge is also confirmed by the Respondents in the answering affidavit. As a result, the point *in limine* stands to be dismissed.

[15] Supervening impossibility.

At the time the matter was argued before the court, counsel for the Respondents made a concession that the Applicant’s claim is based on a contract that is independent from the contract that existed between the First Respondent and the beneficiary. This concession is important and was wisely undertaken in my view. It recognises that the terms of contract between the First Respondent and Sasol / the beneficiary have no impact whatsoever to those between the Applicant and the First Respondent. Should there be a claim in the future for damages based on contractual non-performance between the First Respondent and the beneficiary, the First Respondent would be within its rights to raise the defence of supervening impossibility.**[5]**

[16] I agree with Adv Snyman, Applicant’s counsel responsible for preparation of the heads of arguments, that the guarantee was issued in favour of the beneficiary to secure performance by the First Respondent in the event of default. The purpose thereof was to ensure that Sasol would be protected in case the First Respondent failed to fulfil its contractual obligations for whatever reason.

[17] The kind of contract between the Applicant and the First Respondent can be best illustrated by quoting from *Lombard Insurance Company Ltd v Landmark Holdings (PTY) Ltd and Others***[6]**, where Navsa JA said,

> “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. Whatever disputes may

subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned. The bank's liability to the seller is to honour the credit. The bank undertakes to pay provided only that the conditions specified in the credit are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary. This exception falls within a narrow compass and applies where the seller, for the purpose of drawing on the credit, fraudulently presents to the bank documents that to the seller's knowledge misrepresents the material facts."

[18] The Respondents do not aver any fraud on the part of the Applicant. There isn't even a suggestion by the Respondents that the Applicant had a hand in obstructing the First Respondent from performing the task. They also do not question the validity of the contract existing between them and the Applicant. The obligation on the part of the Respondents is triggered upon confirmation of whether the Applicant issued the guarantees in favour of the beneficiary, whether the beneficiary made a claim and whether the First Respondent failed to perform the task insured against. Upon confirmation of these, as *in casu*, the claim must succeed.

[19] The indemnity signed between the Applicant and the First Respondent provided for costs on attorney and client scale in case of enforcement through judicial processes. No reasons were advanced as to why this clause should not be implemented as agreed.

[20] For the aforesaid reasons, I make the following order.

[20.1] The First, Fifth, Sixth and Seventh Respondents are ordered to pay R2 770 029.30 plus interest calculated at the prescribed rate plus 2% from 22 August 2019 to the date of payment; jointly and severally, the one paying, the other to be absolved.

[20.2] The First, Fifth, Sixth and Seventh Respondents are ordered to pay costs of suit on attorney and client scale.

TV RATSHIBVUMO

DEPUTY JUDGE PRESIDENT

MPUMALANGA

FOR THE APPLICANT;	**ADV. PA VENTER**
INSTRUCTED BY:	**MOLL QUIBELL & ASSOCIATES**
	C/O: VZLR INC
	NELSPRUIT
FOR THE RESPONDENT:	**ADV. JW KLOEK**
INSTRUCTED BY:	**K JORDAAN & ASSOCIATES**
	C/O DU TOIT SMUTS & PARTNERS
	NELSPRUIT

DATE HEARD: 31 OCTOBER 2024

JUDGMENT DELIVERED: 17 DECEMBER 2024

[1] See paragraph 15 of the founding affidavit on p. 10-11 and p. 16-20 of the paginated bundle.

[2] See paragraph 16 of the founding affidavit on p. 11-12 of the paginated bundle.

[3] *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd* **1999 (4) SA 229** (C) at 235A-B.

[4] Herbstein and Van Winsen, *Civil Practice of the High Court* 5th Ed, **2009 Ch 17** p. 525.

[5] See *Peters Flamman and Co v Kokstad Municipality* **1919 AD 427** where Solomon JA excused the Appellants failure to perform owing to the break of the First World War.

[6] **2010 (2) SA 86** (SCA) at paragraph 20.