



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 27 MAY 2022

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Exxaro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd and Another (Case no 169/2021) [2022] ZASCA 76 (27 May 2022)

Today the Supreme Court of Appeal (SCA) delivered a judgment granting the application for leave to appeal brought by the applicant, Exxaro Coal Mpumalanga (Pty) Ltd (Exxaro) and upholding the appeal with costs against a decision of the Gauteng Division of the High Court, Johannesburg (the high court).

The first respondent, TDS Projects Construction and Newrak Mining JV (Pty) Ltd (TDS), sought an order in the high court, interdicting Exxaro from demanding payment and the second respondent, ABSA Bank Ltd (ABSA), from making payment under a demand guarantee it had procured for due fulfilment of its obligations, in terms of a contract it had with Exxaro. The grounds for the interdict were that the demands made by Exxaro were: (a) fraudulently made; and (b) non-compliant with the terms of the guarantee.

Having been conceded on behalf of TDS that a case of fraud was not made out on the papers, the question before the SCA was whether TDS was entitled to a final interdict on the basis that Exxaro's demands were non-compliant with the terms of the guarantee.

The SCA restated the principle that a demand guarantee is akin to an irrevocable letter of credit, which establishes a contractual obligation on the part of the bank to pay the beneficiary on the occurrence of a specified event, and is wholly independent of the underlying contract of sale between the buyer and the seller. The bank will escape liability only upon proof of fraud on the part of the beneficiary, which as conceded on behalf of TDS, was not established in this case.

As to whether the requisites of a final interdict were met, the SCA held that TDS failed to establish any injury. No evidence was presented as to the existence or nature of the relationship between TDS and ABSA or what obligations would arise if ABSA honoured the performance guarantee. More fundamentally, if ABSA were to honour the guarantee when the demand to do so did not comply with the terms of the guarantee, TDS would have a complete defence to a claim by ABSA based on its having done so. The only basis on which any liability of TDS might arise, whether to ABSA or any other party, would be if ABSA was lawfully obliged to honour the guarantee. Consequently, non-compliance with the terms of the guarantee by Exxaro in making its demand was not a violation of any right of TDS. Neither would payment of the guarantee by ABSA result in a violation of a right of TDS. Furthermore, like any contractor in its position, TDS would have a contractual remedy available to it, against the guarantor. The SCA accordingly found that the high court erred in granting the interdict in TDS's favour.

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