THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No. 1299/2017

In the matter between:

ALIDA SCHOEMAN	**FIRST APPELLANT**
CORNELIUS JACOBUS SCHOEMAN	**SECOND APPELLANT**
ALIDA SCHOEMAN NO	**THIRD APPELLANT**
CLAUDE STANLEY BARNES NO	**FOURTH APPELLANT**

and

LOMBARD INSURANCE COMPANY LIMITED	**RESPONDENT**

Neutral citation: *Schoeman & others v Lombard Insurance Co Ltd* (1299/2017) [2019] ZASCA 66 (29 May 2019)

Coram: Tshiqi, Swain, Mathopo and Makgoka JJA and Plasket AJA

Heard: 3 May 2019

Delivered: 29 May 2019

Summary: Demand guarantee – demand guarantee stipulating that demand to be made at address of beneficiary – demand hand-delivered to address of guarantor – place at which demand to be made directory, not mandatory – demand effective.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Maier-Frawley AJ sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Plasket AJA (Tshiqi, Swain, Mathopo and Makgoka JJA concurring)

[1] The respondent, Lombard Insurance Company Ltd (Lombard Insurance), had, in the court below, claimed three amounts totalling R55 148 449.89 from the appellants, Ms Alida Schoeman, Mr Cornelius Schoeman and the trustees of the Erf 260-2 Middelburg Trust (the Trust) in their capacity as sureties and co-principal debtors. The trustees of the Trust are Ms Schoeman and Mr Claude Barnes.

[2] Maier-Frawley AJ, in the Gauteng Division of the High Court, Johannesburg, granted judgment against the appellants in the amounts claimed by Lombard Insurance, together with interest and costs on an attorney and client scale. This appeal is before us with the leave of the court below.

The facts

[3] Golden Sun Retailers (Pty) Ltd (Golden Sun) was a company involved in the sale of fuel. It was supplied with its products on credit by Sasol Oil (Pty) Ltd (Sasol). In order for Golden Sun to acquire fuel on credit, it applied to Lombard Insurance for a General and Commercial Guarantee Facility (the facility). Lombard Insurance provided a quotation, which Golden Sun accepted.

[4] The terms of the facility included the following: the guarantee limit was R55 million, later increased to R60.5 million; the guarantee fee was 1,2 percent of the guarantee amount per annum, excluding VAT; the validity period of the facility was 12 months, renewable every six months; and security in the form of a counter-indemnity given by Golden Sun, suretyships undertaken by Ms Schoeman, Mr Schoeman and the Trust and a cession of Golden Sun's book debts was required.

[5] As a result, Lombard Insurance (as the guarantor) issued Demand Guarantee S.50802 in the amount of R60.5 million on behalf of Golden Sun (as the client) and in favour of Sasol (as the beneficiary). It stated in clause 1:

'Payment shall be made under this guarantee upon receipt by the Guarantor, at the above stated address, of the Beneficiary's first written demand, which written demand will state that the amount of R60 500 000.00 (*SIXTY MILLION FIVE HUNDRED THOUSAND RAND*) or any lesser portion thereof, is now due and payable by the Client to the Beneficiary. The Beneficiary shall also produce the original guarantee should the Guarantor so require.'

The 'above stated address' was Sasol's address, namely 32 Hill Street, Randburg.

[6] Golden Sun executed a counter-indemnity which, in clause 1, indemnified Lombard Insurance against 'any claims, losses, demands, liabilities, costs and expenses of whatsoever nature' that it may 'sustain or incur by reason or in consequence of having executed' the demand guarantee on behalf of Golden Sun.

[7] In terms of clause 2 of the counter-indemnity, Golden Sun undertook to pay Lombard Insurance 'on demand any sum or sums of money which [Lombard Insurance] may be called upon to pay under the Guarantees, whether or not [Lombard Insurance] at such date shall have made such payment, and whether or not I/we admit the validity of such claims against [Lombard Insurance] under the Guarantees'.

[8] At the same time, Ms Schoeman, Mr Schoeman and the Trust bound themselves as sureties and co-principal debtors jointly and severally with Golden Sun in respect of payment by Golden Sun to Lombard Insurance of 'all and any amounts' that Golden Sun 'may be liable to pay' to Lombard Insurance 'under the Indemnity'.

The liability

[9] Golden Sun purchased fuel from Sasol on a 30-day credit account. At the end of a month, Sasol would render a detailed account to Golden Sun. It, in turn, would send the account to Lombard Insurance, with instructions to pay the account. Payments were required to be made by the 15th day of the month following the date of an account.

[10] During the period between the statement date and the payment date, Golden Sun would deposit funds into a redemption account created by Lombard Insurance for the purpose, and Lombard Insurance would pay Sasol on Golden Sun's behalf. From time to time, Golden Sun's payments into the redemption account had not yet cleared by the time that payments to Sasol had to be made. In these cases, Lombard Insurance paid the account and would be credited when Golden Sun's payments had cleared.

[11] It is alleged by the deponent to the founding affidavit, Mr James Barrow, Lombard Insurance's Underwriting Manager: General and Commercial Guarantees Division, that, unknown to Lombard Insurance, Golden Sun began to send to it 'altered, doctored and/or forged Sasol customer account statements'. These allegations were not denied by Ms Schoeman, who deposed to the answering affidavit. She said, however, that she and Mr Schoeman had no knowledge of the fraud and alleged that the fault lay with an employee who administered the Sasol account. It is not necessary to make any findings in this respect.

[12] The result was that Golden Sun had been purchasing fuel well in excess of the quantities that it represented to Lombard Insurance to have purchased. When Lombard Insurance discovered the problem, it raised it with Sasol. It was ascertained that Golden Sun owed Sasol R60 096 097.08.

The claims

[13] On 20 October 2016, Sasol delivered a demand for payment in terms of the demand guarantee. It delivered the demand, for the amount of R60 096 097.08, by

hand to the business premises of Lombard Insurance. The demand was accompanied by supporting customer account statements and invoices. Sasol stated that the amount claimed was not 'the full and final balance outstanding' and that a second demand was likely to be made 'when the outstanding billing is finalised'.

[14] On 27 October 2016, Lombard Insurance, having satisfied itself of the correctness of Sasol's claim, paid Sasol the full amount that it had demanded.

[15] On 31 October 2016, Sasol delivered a demand for payment of a second claim, this time in the amount of R197 014.45. It was delivered by hand to the business premises of Lombard Insurance.

[16] This claim was in respect of fuel sold to Golden Sun, the invoicing of which had not been completed at the time that the first demand was made. Lombard Insurance satisfied itself that it was obliged to pay Sasol and duly did so on 7 November 2016.

[17] After Lombard Insurance had paid in terms of Sasol's first demand, it credited itself with R5 242 269.67. This was the balance of Golden Sun's redemption account. As a result, when Lombard Insurance claimed payment from Golden Sun and the sureties, it demanded payment of R54 853 827.41 in respect of the first claim. Its second claim against them was for the payment of R197 014.45.

[18] Lombard Insurance also had a third claim. It was for an amount of R97 608.03. It represents the outstanding premium in respect of the facility.

[19] Lombard Insurance accordingly demanded of Golden Sun and the sureties that they pay R54 853 827.41, R197 014.45 and R97 608.03. No payment was, however, forthcoming, hence the application that Lombard Insurance brought in the court below.

The issues

[20] Two defences were raised by the appellants. The first related to claims 1 and 2. It was that no valid demand had been made by Sasol of Lombard Insurance in terms of the demand guarantee, with the result that Golden Sun's obligation to pay in terms

of the counter-indemnity was not triggered. Consequently no liability arose on the part of the sureties. The second defence related to claim 3. It was that, in terms of the facility, the premium due was R1 000, and not R97 608.03.

Claims 1 and 2

[21] It was argued on behalf of the appellants that no proper demand had been made of Lombard Insurance by Sasol in terms of the demand guarantee because, whereas the demand guarantee required the demand to be made at Sasol's address, it was in fact made at Lombard Insurance's address.

[22] The argument proceeded from the basis that a demand guarantee was, like a letter of credit, subject to strict and precise compliance in all respects. I am in agreement with Maier-Frawley AJ in the court below that there is 'little to gain from attempts to divine the essential distinction between letters of credit, on the one hand, and demand guarantees, on the other': the real issue, which involves an interpretation of this particular demand guarantee, is 'simply whether there was compliance with the terms of the guarantee under circumstances where the beneficiary's demands for payment were made to the guarantor at its address, rather than at the address of the beneficiary'.

[23] The proper approach to the interpretation of written documents was set out as follows by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[1]
'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[24] The broad context in which the demand guarantee was given was the facility that enabled Golden Sun to purchase fuel on credit from Sasol. Indeed, it commences with the words: 'At the instance of GOLDEN SUN RETAILERS (PROPRIETARY) LIMITED . . .' and records that Lombard Insurance holds at Sasol's disposal, and undertakes, 'subject to the terms and conditions stated below, to pay to [Sasol] all amounts presently due and payable, or which may become due and payable, by [Golden Sun] to [Sasol] arising out of any cause whatsoever . . .'. It was intended, in other words, to protect Sasol from any default on the part of Golden Sun. Although it was part of a greater complex of rights and obligations embodied in the facility, the counter-indemnity and the suretyships, its purpose was to create 'an independent, autonomous contract' between Lombard Insurance and Sasol within which the 'contractual arrangements with the beneficiary and other parties are of no consequence to the guarantor'.[2]

[25] It seeks to achieve its purpose by providing for payment to Sasol by Lombard Insurance 'on the happening of a specified event'.[3] That event is the presentation to Lombard Insurance by Sasol of a demand stating that payment of an amount not exceeding R60.5 million is due.

[26] The provision that the demand must be presented at Sasol's address must be considered in the context that I have outlined, particularly that the primary purpose of

---

[2] *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* [2011] ZASCA 149; 2012 (2) SA 537 (SCA) para 14.
[3] *Dormell Properties 282 CC v Renasa Insurance Co Ltd & others NNO* [2010] ZASCA 137; 2011 (1) SA 70 (SCA) para 61. See too *Firstrand Bank Ltd v Brera Investments CC* [2013] ZASCA 25; 2013 (5) SA 556 (SCA) para 2.

the demand guarantee is to provide for payment to Sasol by Lombard Insurance when a proper demand has been made.

[27] A situation similar to that in the present case arose in *MUR Joint Ventures BV v Compagnie Monegasque De Banque*,[4] a matter decided in the Commercial Court in the Queen's Bench Division. The demand guarantee in that case provided that 'the Bank's obligation under this Guarantee to make a Guaranteed Payment shall arise forthwith upon written demand sent to the bank by way of registered mail to the above mentioned bank's address'. The demand was not sent by registered mail but by courier, fax and e-mail, and it was received by the bank.[5] The point was taken that as the stipulated mode of making the demand was not complied with, the demand was not a valid demand.

[28] Cranston J rejected this argument. He held:[6]

'In my view, this requirement in clause 1 is directory, not mandatory. That is because the guiding principle is one of effective presentation of a demand. The first demand and all its attachments were sent by a variety of means, including couriering. The importance of registered mail is that the communication in question is signed for by the recipient and signature precludes any suggestion that it was not received. In this case there is no question but that the demand and its attachments were received by the Bank. Presentation of the first demand was effective.'

[29] Similarly, in this case, presentation of the demand, albeit not at Sasol's premises, was effective. I am of the view that in the case of the demand guarantee before us, as in the *MUR Joint Venture* case, the requirement of the demand being made at Sasol's address is directory and not mandatory. The result is that the court below correctly concluded that the demands had been properly presented, with the result that Lombard Insurance's obligation to pay was effectively triggered. The appeal in respect of claims 1 and 2 cannot therefore succeed.

Claim 3

---

[4] *MUR Joint Ventures BV v Compagnie Monegasque De Bank* [2016] EWHC 3107 (Comm).
[5] Para 5.
[6] Para 43.

[30] It was argued on behalf of the appellants that, at best for Lombard Insurance, they were only liable, in respect of claim 3, for a single premium payment of R1 000, and not for R97 608.03. Whether this argument is correct depends on an interpretation of the facility and the counter-indemnity.

[31] The facility provided that what it termed 'guarantee fees' were to be paid by clients. They were to be calculated on the basis of 1,2 percent of the guarantee amount per annum, excluding VAT. In respect of the invoicing, the facility stated that the minimum 'premium' per guarantee would be R1 000; that the minimum invoice period would be six months; that, in respect of the invoice period, 'premiums' would be 'based on the nearest number of whole months of the guarantee duration' and be renewable six monthly on the specified renewal month; and that payment of the premium was due on the date of the invoice.

[32] In clause 11 of the counter-indemnity, Golden Sun undertook to pay, 'on submission of an account therefor, the premiums from time to time payable to the Insurance Company'.

[33] It is clear from the facility that a distinction has been drawn between a guarantee fee and a premium. A guarantee fee is the total annual charge for Lombard Insurance to assume the risk of guaranteeing Golden Sun's payments to Sasol. That amount is 1,2 percent of R60.5 million – R726 000 per annum. The premiums that are payable are the fractions of this annual amount, initially payable in terms of the facility by Golden Sun every six months. The evidence was, however, that Lombard Insurance and Golden Sun agreed at an early stage that the premiums would be paid, in instalments of R181 500 plus VAT, every three months in advance. R181 500 is a quarter of R726 000, the guarantee fee. In my view, Maier-Frawley AJ, in the court below, was correct when she concluded that 'the guarantee fees were payable by way of premiums (instalments) on a quarterly basis per annum'.

[34] Golden Sun had paid its premiums diligently on receiving Lombard Insurance's invoices, and did so without demur. Mr Barrow stated that when invoiced in respect of premiums, Golden Sun either paid by setting-off the premium against interest that had

accrued in its redemption account, or by direct transfers of funds, or by a combination of both.

[35] The interpretation contended for by the appellants that it is only liable, at best, for payment of R1 000 is untenable. The amount of R1 000 is not the premium but the 'minimum premium' that may be payable. The appellants' interpretation does not have textual support – where a clear distinction is drawn between the guarantee fee and the premiums that are payable from time to time. An agreement for a client to pay R1 000 in return for a guarantee of R60.5 million is, certainly from Lombard Insurance's perspective, irrational and unbusinesslike, to put it at its lowest.

[36] In terms of clause 11 of the counter-indemnity, Golden Sun was liable to pay the premiums that were due under the facility. In terms of clause 1 of the suretyships, the sureties bound themselves for the due payment by Golden Sun 'of all and any amounts' that Golden Sun may be liable to pay Lombard Insurance 'under the indemnity'.

[37] The amount of R97 608.03 was the amount due by Golden Sun as a premium for the period 6 August 2016 to 6 November 2016, once accrued interest had been deducted from the amount of R181 500 plus VAT.

[38] In the result, the appeal in respect of claim 3 must also fail.

The order

[39] The appeal is dismissed with costs.

_____

C Plasket

Acting Judge of Appeal

APPEARANCES

For the appellant:	L Hollander Instructed by: Edelstein Farber Grobler Inc Johannesburg E G Cooper Majiedt Inc Bloemfontein
For the respondent:	C W Jordaan SC (Heads of argument drafted by C W Jordaan SC, S J Pratt and B De Costa) Instructed by: Fasken Martineau Johannesburg Symington & De Kok Attorneys Bloemfontein