

Summary: Civil Procedure – interdict to stop payment of demand guarantee
– whether requirements for a final interdict satisfied – injury not established
– alternative satisfactory remedy available.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg
(Lamont J, sitting as a court of first instance):

- 1 The application for leave to appeal is granted with costs.
- 2 The appeal is upheld with costs.
- 3 The order of the high court is set aside and replaced with the following order:

‘The application is dismissed with costs.’

JUDGMENT

Mabindla-Boqwana JA (Schippers, Nicholls and Gorven JJA and Meyer AJA concurring)

[1] This is an application for leave to appeal by the applicant, Exxaro Coal Mpumalanga (Pty) Ltd (Exxaro) against the judgment of the Gauteng Division of the High Court, Johannesburg (the high court) and, if successful, the determination of the appeal itself. The application was referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013.

[2] The facts of this case are uncomplicated. On 12 July 2018, Exxaro and the first respondent, TDS Projects Construction and Newrak Mining JV (Pty) Ltd (TDS), entered into a written agreement for the construction of the mechanical and electrical plant, civil, building and engineering works in respect of a project described as the ‘Tunnel Development (Drill and Blast) and Infrastructure Development’ concerning Exxaro’s Matla Coal Mine North West Access Project (the contract).

[3] TDS procured a performance guarantee for the due fulfilment of its obligations in the amount of R32 082 012.90, as required by the contract. The guarantee was issued by the second respondent, ABSA Bank Ltd (ABSA), on 22 August 2018, subject to the following material terms: (a) the guaranteed amount would be paid to Exxaro on receipt by ABSA of a written demand stating that such an amount was due and payable; (b) written demands would be signed by a person who warranted that he/she was duly authorised to do so; (c) the guarantee would expire on 19 June 2020 (the expiry date) and any claim and statement would have to be received by ABSA before the expiry date; and (d) after the expiry date, the guarantee would lapse and any statement received thereafter would be ineffective.

[4] On 9 June 2020, Exxaro sent a letter to TDS terminating the contract with immediate effect on the basis that TDS had committed breaches which it failed to remedy. TDS denies having committed those breaches. The nature of those alleged breaches need not be dealt with in this judgment. On 10 June 2020, Exxaro sought to invoke its rights under the guarantee by sending a demand to ABSA claiming that the guaranteed amount had become payable

as a result of TDS's failure to perform in terms of the contract (the first demand). In response, ABSA advised Exxaro that the demand was 'deemed unfit for processing' by ABSA on various bases, which are also not necessary to state. This was followed by a letter from Exxaro suspending the first demand. On 19 June 2020, Exxaro sent another letter to ABSA retracting the suspension and claiming a lesser amount of R22 165 055.66 (the second demand). Save for this lesser amount, the second demand was identical to the first.

[5] On 25 June 2020, TDS applied to the high court for an interim order interdicting Exxaro from demanding, and ABSA from making payment of any amount under the guarantee to Exxaro, pending determination of the relief sought in Part B of the application. In Part B, TDS sought an order declaring that the demands made by Exxaro for payment of the guarantee were invalid, and a final interdict preventing ABSA from making payment of any amount under the guarantee. Exxaro opposed the application and lodged a counter-application to compel TDS to provide a new or revised guarantee on the basis of an alleged agreement TDS had allegedly reneged on. The high court was only called upon to determine Part B of the application. Although ABSA abided the court's decision, it filed an affidavit to state its position.

[6] The grounds for the interdict were as follows. TDS alleged that 'the first and second demands were fraudulently made' and that it had 'a clear right to prevent [Exxaro] from unlawfully benefiting under the guarantee'. It further alleged that the demands did not comply with the terms of the guarantee in that they were not signed by a person warranting that they had authority to do

so; they failed to state that the amount claimed was due and payable; and they did not indicate the respects in which TDS had breached the contract. As such, ABSA was not legally obliged to honour the guarantee since its terms governing the demand had not been met.

[7] The harm or injury that TDS allegedly would suffer if the interdict was not granted, was stated as follows:

‘[T]he second respondent [ABSA] will make payment of the full amount under the guarantee to the first respondent [Exxaro], notwithstanding the absence of any entitlement whatsoever on the part of [Exxaro];

the applicant [TDS], having been subject to a fraudulent call, will suffer severe financial prejudice in relation to the trigger of counter-guarantees and immediate liability under circumstances where there would otherwise be none (and ought to be none having regard to the absence of an entitlement on the part of [Exxaro]);

the foregoing would trigger events of default in respect of [TDS’s] various facilities and/or contracts, the dire consequences of which would include the cancellation of such contracts and/or immediate calling up of such facilities when they would not otherwise have been an immediate liability...’

This was all that was said. These assertions were not based on any evidence as to the consequences, if any, that the honouring of the demand by ABSA would have on TDS.

[8] TDS then alleged that it had no other satisfactory remedy. It claimed that its damages, which were not confined to the amount paid under the guarantee, were impossible alternatively extremely difficult, to quantify and would in all likelihood be recovered well into the distant future, whilst its business would be crippled or destroyed in the interim.

[9] The high court stated that it was unnecessary to deal with the allegations that the demand for payment of the guarantee was fraudulently made, because the non-compliance with the terms of the guarantee was dispositive of the matter. Relying on *State Bank of India and Another v Denel SOC Limited and Others (State Bank of India)*,¹ the high court held that TDS was entitled to raise the issue of non-compliance with the demand, on the basis of a contract of mandate (the banker-client relationship). Consequently, the high court granted an order declaring the demands to be invalid and of no force or effect. It refused Exxaro's counter-application on the basis that there were disputes of fact which could not be resolved on the papers and further, that there was an arbitration provision in the contract to deal with the dispute concerning the counter-application.

[10] It was common cause between the parties that the performance guarantee issued by ABSA is a demand guarantee. As was held in *Loomcraft Fabrics CC v Nedbank Ltd and Another (Loomcraft)*² and numerous cases that followed it, 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.³

¹ *State Bank of India and Another v Denel SOC Limited and Others* [2014] ZASCA 212; [2015] 2 All SA 152 (SCA) para 27.

² *Loomcraft Fabrics CC v Nedbank Ltd and Another* [1996] 1 All SA 51 (A); 1996 (1) SA 812 (A) at 815G-J; *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA) para 20; *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA) paras 10-13.

³ *Loomcraft* fn 2 above.

The importance of allowing banks to honour their obligations under irrevocable credits without judicial interference, was stressed in *Loomcraft*, where it was stated that an interdict by the buyer to restrain a bank from paying under a letter of credit would not be granted save in the most exceptional cases.⁴

[11] Counsel for TDS conceded that no case of fraud was made out in the founding affidavit. In its supplementary founding affidavit, TDS alleged that the focal point of the application was ‘whether there exists a compliant demand for payment under the guarantee’. Thus, the case made out by TDS was non-compliance by Exxaro with the terms of the guarantee.

[12] The question, therefore, is whether TDS was entitled to an interdict on this basis. The requisites for the grant of a final interdict are trite: a clear right; an injury actually committed or reasonably apprehended; and the absence of another adequate remedy.⁵

[13] In my view, TDS failed to establish any injury ie ‘something actually done which is prejudicial to or interferes with the applicant’s right’.⁶ The alleged injury was firstly, founded on ‘a fraudulent call’ on the guarantee, which – it was conceded – had not been established. Secondly, the terms of the banker-customer relationship between TDS and ABSA, the content of the counter-guarantees that allegedly would have resulted in ‘immediate liability’

⁴ *Loomcraft* fn 2 above at 816D-H.

⁵ *Setlogelo v Setlogelo* 1914 AD 221.

⁶ *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 21.

to TDS, and the ‘default in respect of various facilities’ that would be triggered, were not pleaded. In short, 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.

[14] More fundamentally, however, 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. The entire argument before us was that the demand made of ABSA was not lawful since it did not comply with the terms of the guarantee. Consequently, non-compliance with the terms of the guarantee by Exxaro in making its demand is not a violation of any right of TDS. Neither will payment of the guarantee by ABSA result in a violation of a right of TDS. Indeed, this was conceded by counsel for TDS. That being the case, TDS could not show that it would sustain any injury if ABSA honoured the guarantee when not obliged to do so.

[15] What is more, any contractor that has given a performance guarantee and which is in the same position as TDS, ‘. . . would have its ordinary contractual remedy against [the guarantor]’.⁷ In this matter, the remedy is a complete defence to any claim founded on the honouring of the guarantee when ABSA was not obliged to do so. This accords with the principle stated

⁷ *Loomcraft* fn 2 above at 823H-823I.

in *State Bank of India*⁸ that ‘South African courts, like their international counterparts, should jealously guard the international practice that banks honour the obligations they have assumed in terms of guarantees issued by them’ save in exceptional cases where fraud is involved. Otherwise viewed, it would mean that every contractor in the position of TDS, could simply seek an interdict in circumstances where it has a satisfactory remedy available to it. This is a further reason why the interdict ought not to have been granted. In this regard the high court erred.

[16] By reason of the conclusion to which I have come, it is unnecessary to consider the counter-application. There is no reason why costs should not follow the result.

[17] For those reasons, the following order is made:

- 1 The application for leave to appeal is granted with costs.
- 2 The appeal is upheld with costs.
- 3 The order of the high court is set aside and replaced with the following order:

‘The application is dismissed with costs.’

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

⁸ *State Bank of India* fn 1 above paras 6-7.

Appearances:

For applicant:

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Instructed by:

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