

SOUTH AFRICA / JUDGMENT

Eskom Holdings SOC Ltd v Santam Ltd and Another (44268/19) [2022] ZAGPJHC 1045 (12 August 2022)

[2022] ZAGPJHC 1045

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vally

CASE / FILE NUMBER

44268/19

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Reportable: Yes

Of interest to other judges: Yes

12 Aug 2022

Vally J

Case No.: 44268/19

In the matter between:

Eskom Holdings SOC Ltd Applicant

and

Santam Ltd First

Respondent

Jyoti Structures Africa (Pty) Ltd Second

Respondent

Judgment

Introduction

- [1] The applicant (Eskom) entered into a contract on 29 April 2016 with the second respondent (Jyoti) in terms of which Jyoti was to construct a transmission line for Eskom. The contract is a standard engineering and construction contract (NEC3) utilised by Eskom when procuring services from a party. On 16 May 2019, as security for the proper performance of its obligations, Jyoti issued Eskom with a Performance Bond - Demand Guarantee (Guarantee)
- which Eskom could call before its expiry date, 31 October 2019. It was underwritten by the first respondent (Santam).
- [2] In terms of the Guarantee, Santam agreed that it holds a sum of R20 339 245, 25 (Twenty-Million three hundred and thirty-nine thousand two hundred and forty-five rands and twenty-five cents) 'at the disposal of Eskom, as security for the proper performance by [Jyoti] ... and agreed to pay Eskom, on written demand received from Eskom prior to' 31 October 2019. The written demand for payment (demand) had to meet three conditions. The first condition was that it had to 'be signed on behalf of Eskom by a director of Eskom or an authorised delegate.' The second condition was that it had to 'state the amount claimed'. And the third condition was that it had to 'state that the Demand Amount is payable to Eskom in the circumstances contemplated in the' contract between Eskom and Jyoti.
- [3] On 17 October 2019 Eskom issued the demand. Attached to the demand was a copy of the Guarantee. The demand is brief and succinct. Given the importance of the demand for determination of the dispute it is necessary to quote it in full:

'CONSTRUCTION OF SECTION A OF ARIADNE EROS 132/400 KV MULTI CIRCUIT LINE
PURCHASE ORDER NUMBER: 4502349088

CALL-UP OF PERFORMANCE BOND-JYOTI STRUCTURES (PTY) LTD

Eskom Holdings SOC Limited and Jyoti Structures Africa (Pty) Ltd entered into a contract for construction of the Ariadne Eros Section A, 400 KV line. This contract was signed by both parties 29 April 2016.

As security for the proper performance by the contractor of its obligations in terms of and arising from the said contract, Santam issued an on demand guarantee under number 13731, the copy of original of which is attached to this document, for payment of the guaranteed sum, as defined in the said guarantee.

Eskom herewith demands payment of the total said guaranteed sum, and confirm that this is the demand amount as defined in the said guarantee.

This demand is made in circumstances as contemplated in the contract between the parties.

The signatory hereof has been duly authorised to make this demand.'

[4] The material elements of the demand are captured in three sentences that are intended to meet the three conditions:

[4.1] The sentence directed at meeting the first condition reads:

‘The signatory hereof has been duly authorised to make this demand.’

It was signed by a Mr Clint Fisher who was the ‘Senior Manager Projects’.

[4.2] The sentence directed at meeting the second condition reads:

‘The demand is made in circumstances as contemplated in the contract between the parties’ [i.e. Eskom and Jyoti]

[4.3] The sentence directed at meeting the third condition reads:

‘Eskom herewith demands payment of the total guaranteed sum, and confirm that this is the demand amount, as defined in the said guarantee.’

[5] Santam refused to meet the demand. The reason for its refusal, according to its legal representative who wrote to Eskom, was that the Guarantee was a ‘conditional guarantee akin to a suretyship.’ As a result, Eskom launched the present application.

[6] There can be little doubt that the claim by Santam conveyed by its legal representative was manifestly wrong. A simple reading of the Guarantee makes it plain that it was not a conditional one akin to a suretyship. Having received the application Santam changed its reason for refusing to meet the demand. In its answering affidavit it said that the demand did not comply with any of the three conditions set out in the Guarantee, thereby allowing it to repudiate the call.

The law

[7] The law on guarantees is straightforward. It has been wholly adopted from English law.

[8] A guarantee, a performance bond and a letter of credit are essentially the same.[1] Each of them is a contract ancillary to another contract, the latter being the underlying or principal contract. Without it the principal contract is incomplete and incapable of being put into effect. The guarantee introduces a third party – normally a bank or an insurance company – to the relationship between the two principal contracting parties. At the behest of one of the parties – seller of services or purchaser of goods – the third party promises to pay the other party a pre-determined sum of money. The purpose of a guarantee then is to provide security to one party to a contract that the other party shall perform its obligations, or at least it shall be compensated, should the party fail to perform its obligations.

[9] While the guarantee is ancillary to the principal contract it however enjoys an independent existence. Because of its independent existence the question of whether the party has failed to perform does not often arise when the guarantee is drawn upon, or is irrelevant. This is normally so because the terms of the guarantee are often irrevocable and require payment

on demand when due, and the party furnishing the guarantee – third party, such as a bank or insurance company – is not a party to the contract and has no role to play therein. A guarantee is an indispensable part of international trade.[2] There must however be compliance with the terms of the guarantee for it to be honoured. Put differently, courts do not concern themselves

with disputes between the parties to the contract. Once the terms of the guarantee are complied with, the obligation on the part of the bank or insurance company to pay can only be avoided in very strict circumstances, such as a clear case of fraud. Thus, ‘courts are not concerned with [the contracting parties’] failure to enforce their claims against each other; these are risks [the contracting parties] take.’[3] The principle has been repeatedly enunciated in many judgments,[4] and is now accepted as trite.

The issue

[10] There is a single issue which requires determination: does the demand satisfy the three conditions set out in the Guarantee?

Analysis

[11] Eskom had a right to draw on the Guarantee by demand. It exercised the right. Its demand is focussed. To recall: Santam’s avoidance of liability is based on the contention that it does not satisfy any of the three conditions set out in the guarantee.

[12] The averment by the author of the demand, a Mr Clint Fisher, makes it abundantly clear that he ‘is authorised to make the demand hereof’. Absent a challenge to his authority, which challenge had to be raised at the time the demand was made, Eskom has complied with the first condition. Santam failed to raise the issue of his authority at the time he made the demand. In its answering affidavit it does not say why he is not authorised to make the demand. It simply baldly denies that he is so authorised and leaves it to Eskom to prove his authority. But this, in my judgment, is inadequate; it had to provide some basis for challenging his authority.[5] Having failed to do so means that Mr Fisher’s averment in the founding affidavit that he is authorised to make the demand is sufficient proof that he is so authorised. Absent a proper challenge thereof, Eskom has complied with the first condition.

[13] The demand states that the amount demanded is ‘the total guaranteed sum’. It goes further to state, ‘and confirm that this is the demand amount, as defined in the said guarantee.’ A copy of the Guarantee was annexed to the demand. On any reading of the demand there can be no doubt that the demand was for the full sum

of the Guarantee. The full sum as stated in the Guarantee is R20 339 243, 25. There is no ambiguity, uncertainty or doubt about this. No reasonable reader having regard to the demand and the Guarantee could come to any conclusion other than that the full sum of R20 339 243, 25 was demanded. Santam’s contention that the demand fails to meet the second condition is therefore without merit.

[14] The third condition concerns the circumstances under which the demand is made. The Guarantee requires that the demand must 'state that the Demand Amount is payable to Eskom in the circumstances contemplated in the' contract between Eskom and Jyoti. The demand states that 'this demand is made in circumstances as contemplated in the contract between the parties.' Mr Mc Aslin for Santam submitted that, as the wording in the demand is not a verbatim copy of the wording used in the Guarantee, the demand fails to meet the third condition. I cannot agree. The demand says it is in circumstances as contemplated in the contract between the parties whereas the Guarantee says it must state that it is made 'in the circumstances contemplated in the Contract.' The 'Contract' refers to no more than the contract between Eskom and Jyoti. There is no other contract. That is common cause. The wording in the demand refers to 'contract' as opposed to 'Contract'.

But this is of no moment. The demand makes clear that it is the contract between the parties, and the first paragraph of the demand

explicitly informs that 'Eskom Holdings SOC Limited and Jyoti Structures Africa (Pty) Ltd entered into a contract for construction

of the Ariadne Eros Section A, 400 KV line. This contract was signed by both parties 29 April 2016.' So the additional phrase,

'between the parties' after the word 'contract' in the demand is merely a reference to the contract between Eskom and Jyoti, which is the same 'Contract' referred to in the Guarantee. In both the Guarantee and the demand the word is used as a noun. And both refer to the same agreement between Eskom and Jyoti. There is neither distinction nor difference between the wording in the demand and Guarantee. It follows that the third ground of challenge must fail.

[15] The demand, I hold, has fully and unequivocally complied with the three conditions set out in the Guarantee.

[16] Mr Mc Aslin for Santam submitted that our law has developed to the point that the demand must comply strictly and not just substantially with the terms of the guarantee for it to be valid. There is no dictum to this effect in the authorities. Mr Mc Aslin says it can be derived from how the court in Delfs[6] dealt with the issue. In Delfs the court was required to determine whether an oral contract between an agent – a shipping and forwarding agent to be exact

- and a principal contained an implied term. The plaintiff (the agent) sued for fees and disbursements. The defendant, (principal) had sold certain wild animals to another party in London (the purchaser), who in turn had sold the animals to a person in Saudi Arabia. As seller, the defendant required a letter of credit from a bank before it would give effect to the purchase and sale contract between it and the purchaser. On account of the purchaser, Barclays Bank in London issued an irrevocable letter of credit. The plaintiff as agent arranged for the transportation of the animals - the 'cargo', in transportation parlance. The documentation relating to the cargo did not match the actual cargo as some of the animals

had died before they were loaded onto the airplane. The airline transporting the animals refused to accept them until the documentation was amended to reflect the actual amount and correct description of the animals. The documentation was accordingly amended 'to reflect the true position.'^[7] The amendment placed in peril the defendant's duty to comply with the terms of the letter of credit. What then occurred is best captured in the following paragraph from the judgment:

'The animals were duly transported to Saudi Arabia and the letter of credit was presented for payment. The bank refused to honour it on various grounds. It is unnecessary to refer to each. It relied, inter alia, on the discrepancies between the specification of the goods in it and that appearing in the documents to which I have referred. It was common cause that the Bank was entitled to refuse to pay out in the circumstances; that it was the sole responsibility of the defendant to obtain the letter of credit in a form acceptable to him; and that the plaintiff was in no way responsible for ensuring that the correct number of animals were available for shipment.'^[8]

Upon being sued by the plaintiff for fees and disbursements, the defendant pleaded that there was an implied term to the contract to the effect that the plaintiff would ensure that the information on the waybill would comply with the conditions set out in the letter of credit so that the letter of credit would be met by Barclays. The court, after carefully examining the facts, ruled that no such implied term was proven by the defendant. As regards the issue of the right of Barclays to refuse to honour the letter of credit the court said no more than that '[i]t was common cause that the bank was entitled to refuse to pay out in the circumstances and that it was the sole responsibility of the defendant to obtain the letter of credit in a form acceptable to him.' The court said nothing to the effect that there has to be strict compliance with the terms or conditions set out in a letter of credit, failing which the issuer is entitled to refuse to honour it. Mr Mc Aslin's submission that – to quote from his heads – 'the case is illustrative of the principle of strict compliance in our law,' is plainly wrong. No learning to this effect can be drawn from the sentence in the paragraph quoted here. The court was not concerned with the issue of compliance with the terms of the letter of credit and therefore did not shift the dial on the law regarding letters of credit.

[17] That said, there is no need for me to develop the law in this regard. That must be left for another day where the facts more suitable for the consideration of this issue are available, and where full submissions on the issue are received. Here the facts are clear: Eskom has complied with the terms of the Guarantee in every respect.

[18] To conclude: Santam's opposition to the application fails on each of the three grounds upon which it is based.

Costs

[19] Both parties agreed that costs should follow the result. I see no reason to adopt a different view.

Order

[20] The following order is made:

1. The first respondent is to pay the applicant:

1.1 The sum of R20 339 243, 25 (Twenty million three hundred thirty nine thousand forty three rands and twenty five cents).

1.2 Interest on the aforesaid amount from date of demand, being 17 October 2019, to date of payment at the legally prescribed rate of 7 percent per annum.

2. The first respondent is to pay the costs of the application

Dates of hearing: 20 July 2022

Date of Judgment: 12 August 2022

Representation

For the applicant: A Govender with N Ndlovu

Instructed by: Gildenhuys Malatji Attorneys

For the respondent: C J Mc Aslin SC

Instructed by: Moll Quibell and Associates

[1] In this judgment a reference to one is a reference to all three

[2] ‘They are the life-blood of international commerce’ R D Harbottle and another v National Westminster Bank Ltd and others

[1977] 2 All ER 862 (QB) at 870b

[3] Id. See Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd 2010 (2) SA 86 (SCA) at [20]; Loomcraft Fabrics CC v Nedbank

[1995] ZASCA 127; 1996 (1) SA 812 (A) at 815G-H; OK Bazzars (1929) Ltd v Standard Bank South Africa Ltd 2002 (3) SA 688 (SCA) at [25]

[4] Edward Owen Engineering Ltd v Barclays Bank International Ltd

[1978] 1 All ER 976 (CA) at 981e-984f, and the cases cited therein. Coface South African Insurance Co Ltd v East London Own Haven/ Own Haven Housing Association 2014 (2) SA 382 (SCA) at [10] – [13]

[5] Wightman t/a JW Construction v Headfour (Pty) Ltd

[2008] ZASCA 6; 2008 (3) SA 371 (SCA) at [12] - [13]

[6] Delfs v Kuehne & Nagel (Pty) Ltd 1990 (1) SA 822 (A)

[7][7] Id at 826E

[8] Id at 826G-H

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