

SOUTH AFRICA / JUDGMENT

Johannesburg Development Agency (Pty) Ltd v Federated Insurance Guarantees Brokers (Pty) Ltd (6647/06) [2007] ZAKZHC 57 (30 April 2007) [2007] ZAKZHC 57

COURT

High Courts - Kwazulu Natal

BEFORE

Niles-Dun&RJ

CASE / FILE NUMBER

6647/06

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IN

THE HIGH COURT OF SOUTH AFRICA DURBAN AND COAST LOCAL DIVISION

Case

No 6647/06

In

the matter between:

THE
JOHANNESBURG DEVELOPMENT
AGENCY
(PTY) LTD Applicant
and
FEDERATED
INSURANCE GUARANTEES
BROKERS
(PTY) LTD Respondent
DATE
OF HEARING: 1
December 2006
DATE
OF JUDGMENT: 30 April 2007

JUDGMENT

NILES-DUN&RJ:

[1] The applicant and Dlamini Construction (Pty) Limited ("the contractor") concluded a building contract in the form of a standard JBCC Series 2000 Principal Building Agreement. Pursuant to Clause 14 of the contract the contractor elected to furnish the applicant with security in the form of a variable construction guarantee as provided for in Clause 14.3 and at the instance of the contractor the respondent issued a-variable construction guarantee in favour of the applicant.

[2] This guarantee is headed "Construction Guarantee for use with the JBCC Principal Building Agreement", and under the sub-heading

"GENERAL PROVISIONS APPLICABLE TO VARIABLE AND TO FIXED • CONSTRUCTION GUARANTEES" contains, inter alia, the following clauses:

"3.0 The Guarantor hereby acknowledges that:

3.1 Reference herein to the agreement, and the incorporation herein of provisions thereof in terms of Clause 3.1 hereof shall not be construed to constitute this guarantee as being a suretyship or an accessory obligation of any nature whatever.

3.2 Its obligation under this Guarantee is restricted to the payment of money.

3.3 Reference to a practical completion certificate or to a final completion certificate shall mean such certificate as issued by the Principal Agent

4.0 Subject to the guarantor's maximum liability referred to in Clauses 1.0 and 2.0 above, the uarantor hereby binds itself in favour of the Employer the certified sum upon receipt of the documents identified in Clauses 4.1 to 4.3 below:

4.1 A copy of the first written demand issued by the Employer to the Contractor stating that payment of a sum certified by the Principal Agent , has not been made in terms of the Agreement and failing such payment within seven (7) calendar days, the Employer intends to call upon the Guarantor to make payment in terms of 4.2.

4.2 A first written demand issued by the Employer to the Guarantor at the Guarantor's domicilium citandi et executandi with a copy to the Contractor stating that a period of seven (7) calendar days has elapsed since the first written demand in terms of 4.1 and that the sum certified has still not been paid therefore the Employer calls up this Construction Guarantee and demands payment of the sum certified from the Guarantor.

4.3 A copy of the payment certificate which entitles the Employer to receive payment in terms of the Agreement of the amount certified in Clause 4.0 above.

5.0 Subject to the Guarantor's maximum liability referred to in Clauses 1.0 and 2.0 above, the Guarantor undertakes to pay the Employer Guaranteed sum or the full outstanding balance upon receipt of the first written demand from the Employer to the Guarantor at the Guarantors domicilium citgndi et executandi calling up this Construction Guarantee stating that

5.1 The Agreement has been cancelled due to the Contractor's default and that the Construction Guarantee is called up in terms of 5.0. The demand shall enclose a copy of the notice of cancellation; or

5.2 A provisional sequestration or liquidation court order has been granted against the Contractor and that the Construction Guarantee is called up in terms of 5.0. The demand shall enclose a copy of the court order.

6.0 It is recorded that the aggregate amount of payments required to be made by the guarantor in terms of 4.0 and 5.0 shall not exceed the Guarantor's maximum liability in terms of 1.0 and 2.0.

7.0 Where the Guarantor is a registered insurer in terms of the short-term insurance act No. 53 of 1998 and has made payment in terms of 5.0:the Employer, shall upon the date of issue of the final payment certificate submit an expense account to the Guarantor showing how all monies received in terms of the Construction Guarantee have been expended and shall refund to the guarantor any resulting surplus. All monies refunded to the Guarantor in terms of this Construction Guarantee shall bear interest at Standard Bank of South Africa Limited's prime overdraft rate compounded monthly and calculated from the date payment was made by the Guarantor to the Employer until the date of refund.

8.0 Payment by the Guarantor in terms of 4.0 and 5.0 shall be made within (7) calendar days upon receipt of the first written demand to the Guarantor."

"12.0 This Construction Guarantee, with the required demand notices in terms of 4.0 and 5.0, shall be regarded as a liquid document for the purpose of obtaining a court order."

[3] It is common cause that the applicable guaranteed sum is the amount of R1 754 279,26. It is also common cause that the respondent

received the applicant's first written demand pursuant to the provisions of Clause 5.0 of the guarantee which stated, in terms of Clause 5.1 thereof, (a) that the agreement had been cancelled due to the contractor's default, and (b) that the guarantee was called up in terms of Clause 5.0, and which written demand enclosed a copy of the notice of cancellation.

[4] The issue that falls for decision is whether the receipt by the respondent of that first written demand alone generates a liability

to pay to the applicant the guaranteed sum.

[5] In terms of Clause 14.3.4 of the contract, "Where the employer has a right of recovery against the contractor in terms of 33.0, the employer may issue a written demand in terms of the variable construction guarantee." Such written demand is either one under the provisions of Clause 4.0, or under Clause 5.0 of the guarantee, and the right of recovery of the employer falls into two different categories in terms of Clause 33.0 which determine under which clause of the guarantee it is called up.

[6] Clause 33.0 of the contract, under the heading "RECOVERY OF EXPENSE AND LOSS", reads as follows, and I have italicised those parts of the clause relevant to the present enquiry:

"33.1. The principal agent shall issue a recovery statement monthly to the employer and contractor simultaneously with the payment certificate.

Explanatory documentation as may be necessary to support the calculation of amounts stated shall accompany the recovery statement. The principal agent shall show on the recovery statement amounts due to the employer for:

33.11. Penalties levied in terms of 30.0

33.1.2 Default interest in terms of 31.12

33.

1. 3 Expense and loss in terms of 33.2

and amounts due to the contractor for:

33.1.4 Compensatory interest in terms of 31.10

33.1.5 Default interest in terms of 31.11

33.1.6 Damages in terms of 38.5.6

33.1.7 Advance payments in terms of 14.5

33.2 The employer may recover expense and loss incurred or to be resulting from or to be resulting from

33.2.1 The employer effecting insurance upon the contractor's default in terms of 12.3

33.2.2 Work executed by other parties in terms of 17.4

33.2.3 Cancellation of a nominated subcontract in terms of 20.10

33.2.4 Recoupment of advance payments in terms of 14.5

33.2.5 The contractor not paying the amount due to the employer in terms of 31.12

33.2.6 The agreement being cancelled in terms of 36.0

33.2.7 Default by the contractor if not less than seven (7) calendar days notice detailing such default has been given before the issue of the next recovery statement to allow the contractor the opportunity to remedy such default

A 33.2.8 The mounts paid direct to nominated subcontractors or selected subcontractors in terms of 20.6 or 21.6

33.3 The principal agent shall include an amount due in terms of the recovery statement in the accompanying payment certificate. Where the payment certificate reflects an amount in favour of the employer and the contractor has not paid in terms of 31.12, such amount may be recovered by the employer from any or all of the following in no specific sequence:

33.3.1 Subsequent payment certificates

33.3.2

Security in terms of 14.0

33.3.3 The contractor as a debt

33.4 Where the employer decides to recover an amount due in terms of 33.3 from a cash deposit in terms of 14.2, or from a payment reduction in terms of 14.4.5, the employer shall notify the contractor and the principal agent thereof. Should such amount not be paid to the employer within seven (7) calendar days of the date of receipt of such a notice by the contractor, the employer may recover such an amount from the security

Where the employer decides to recover an amount due in terms of 33.3 from a construction guarantee or advance payment guarantee held as security, the employer shall issue a written demand to the contractor in terms of such guarantees (sic)

33.6 Where a provisional sequestration or provisional liquidation order has been granted or where an order has been granted which commences sequestration, liquidation, bankruptcy, receivership, winding-up or any similar effect against the contractor or this agreement is cancelled in terms of 36.0, the employer may issue a written demand to the guarantor in terms of the construction guarantee or advance payment guarantee

held f as security. "J

[7] Clause 31.1, under the heading "PAYMENT" and sub-heading "31.0

- INTERIM PAYMENT TO THE CONTRACTOR" is to the following effect:

"The principal agent shall issue an interim payment certificate every month on or before the date stated in the schedule until the issue of the final payment certificate. The payment certificate may be for a nil or negative amount and shall be based on a valuation prepared within seven (7) calendar days before the date stated in the schedule for the issue of an interim payment certificate.";

and Clause 31.12, the following:

"Where a payment certificate reflects an amount in favour of the employer, the contractor shall pay the amount certified within seven (7) calendar days of the date of issue of the payment certificate. Where such an amount has not been paid, the contractor shall be liable for default interest in terms of 31.11 mutatis mutandis and the principal agent shall include such an amount in the recovery statement in terms of 33.0."

[8] Clause 36, dealing with cancellation by the employer owing to the contractor's default, contains the following relevant sub-clauses:

"36.5 Where this agreement is cancelled in terms of 36.0 the following shall apply:

36.5.2 The principal agent shall forthwith compile a report on the status of the portion of the works executed by the contractor and shall issue such a report to the employer and the contractor.

36.5.3 On completion of the status report the principal agent shall commence forthwith and complete a final account within a reasonable time."

36.5.4 Where applicable the employer shall be entitled to apply the penalty in terms of 30.1 up to the date of cancellation and thereafter may recover damages from the contractor.

36.5.10 The principal agent shall issue no further payment certificates until the quantum of damages in terms of 36.5.8 has been determined and the final account in terms of 36.5.3 has been completed. The final payment certificate shall then be issued",

"36.6 The employer's right to cancel in terms of 36.0 may not be exercised should the employer be in a material breach of this agreement."

[9] Clause 1.1 of the contract contains the following definitions:

"FINAL ACCOUNT" means the document, prepared by the principal agent, which reflects the contract value of the works at final completion or cancellation in terms of 36.0 to 39.0.

"PAYMENT CERTIFICATE" means a document issued by the principal agent certifying the amount due and payable by the employer to the contractor or vice versa.

"RECOVERY STATEMENT" means the statement, prepared monthly by the principal agent using the prescribed JBCC Recovery Statement form, showing the balance due to the employer or contractor between the accumulated expense and loss and the amount recovered in terms of 33.0."

[10]The first situation, which culminates in the invoking of Clause 4 of the guarantee, is dealt with in Clause 33.1 read with Clauses 33.2, 33.3, 33.4 and 33.5 - the liability of the guarantor being generated by receipt by the guarantor of the first written demand, as referred to in Clause 33.5 (Clause 4.1), and the documents referred to in Clauses 4.2 and 4.3.

- [11] In terms of these clauses the right of recovery relates to a payment certificate reflecting an amount in favour of the employer as per the recovery statement and Clause 4 expressly refers to the sum and amount so "certified". Further, in terms of Clause 4 of the guarantee, the written demand is first made of the contractor and then of the guarantor.
- [12] Despite the provisions of Clause 33.2.6, Clause 33.1 simply cannot be applicable where the contract is cancelled in terms of Clause 36 because in terms of Clause 36.5.10 the principal agent shall not issue 'any further payment certificates until the final account in terms of Clause 36.5.3 has been completed and the final payment certificate issued.
- [13] The second situation, which culminates in the invoking of Clause 5 of the guarantee, is dealt with in Clause 33.6 of the contract.
- [14] In terms of Clause 36.5 cancellation must be followed by the compilation of a status report (Clause 36.5.2), on completion thereof by completion of a final account (Clause 36.5.3) and the issue of the final payment certificate (Clause 36.5.10).
- [15] Clause 5 of the guarantee makes no reference to any of these three documents nor to any "certified sum". Neither is any prior demand of the contractor required.
- [16] In my opinion the guarantee contemplates recovery, by calling up the guarantee, of certified sums in terms of monthly recovery statements and payment certificates, and recovery of the full guaranteed sum (or the full outstanding balance of the guaranteed sum after certified sums have been paid pursuant to the call up of the guarantee in terms of Clause 4) where the contract is cancelled or a court order has been granted (in terms of Clause 5.2) - provided only that the provisions of Clauses 4 and 5 of the guarantee are complied with.
- [17] That this is the case is in my view borne out by the provisions of Clause 7 of the guarantee which clearly contemplate payment by the guarantor to the employer prior to the issue of the final payment certificate - albeit where the guarantor is a registered insurer, which the respondent is not.
- [18] The establishment by the guarantee of such a principal obligation is consistent with the interpretation of the guarantee as a whole read in the context of the building contract and the purpose for which the guarantee was furnished -namely the provision of security without the necessity of first having to prove the indebtedness of the contractor or the quantum thereof.
- [19] The respondent has additionally raised the defence that because the applicant was itself in breach of the contract, its cancellation was invalid in consequence of the provisions of Clause 36.6.

[20] Having regard to my finding that receipt of the first written demand complying with the provisions of Clause 5 of the guarantee alone generates liability, and that the guarantee constitutes a principal obligation and not one ancillary to the contractor's obligations in terms of the contract, I am of the view that such a defence is not open to the respondent in these proceedings: by this regard I refer also to Clause 14.6 of the contract, which reads as follows:

"Payments made by the guarantor to the employer in terms of a construction guarantee or advance payment guarantee shall not prejudice the rights of the employer or contractor in terms of this agreement."

[21] In any event, on the allegations made on the papers I am of the view that even if the respondent were entitled to rely on Clause 36.6 to avoid liability, it has not discharged the onus resting upon it of establishing that the applicant was in material breach of the contract.

[22] It follows that the applicant is entitled to the relief it seeks. Counsel for the applicant has argued that costs should include those consequent upon the employment of two counsel. I am, however, not persuaded that such an order is justified.

The respondent is to pay:-

- (a) to the applicant:
 - (i) the sum of R1 754 279,26;
 - (ii) interest thereon at the rate of 15,5% p.a. from 9 March 2006 to date of payment.
- (b) costs of suit.

For the applicant: R J Salmon SC with him C J McAslin
Instructed by: Bell Dewar & Hall,
Johannesburg

Correspondents: Henwood Britter & Caney, Durban

For the respondent: P J Olsen SC
Instructed by: Cox Yeats, Durban

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Prepared on 11 October 2026 · Esheria