

SOUTH AFRICA / JUDGMENT

New Reclamation Group (Pty) Ltd v Tansnet SOC Ltd and Another (2018/16394; 2018/18284) [2018] ZAGPJHC 431 (23 May 2018)

[2018] ZAGPJHC 431

COURT

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

2018/16394; 2018/18284

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

URGENT

COURT CASE NO: 2018/16394

LINKED

TO CASE NO: 2018/18284

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

THE
NEW RECLAMATION GROUP (PTY)
LIMITED Applicant
and
TRANSNET
SOC
LIMITED First
Respondent
NEDBANK
LIMITED Second
Respondent

JUDGMENT

ADAMS J:

[1]. This is an urgent application by the first respondent in terms of the provisions of Uniform Rule 6(12)(c) for reconsideration of an order granted by me on an urgent basis on the 15th of May 2018. The order granted in favour of the applicant against the respondents reads as follows:

‘ Pending the outcome of this application the following order is made:

2. Interdicting and restraining the first respondent from claiming monies from the second respondent under guarantee number 3134110 issued by the second respondent (‘the guarantee’);
3. Interdicting and restraining the second respondent from paying any monies to the first respondent in respect of the guarantee;
4. The cost of the hearing of this application on the 15th May 2018 is rescinded’.

[2]. In the original application the applicant approached the court after hours for the above order on the basis that the first respondent was not entitled from a legal point of view to cash in the guarantee number 31341101 issued on the 1st of November 2011 by the second respondent on behalf of the applicant in favour of the first respondent. The applicant contended that there was a dispute relating to the causa, namely the contractual relationship between the applicant and the first respondent, underlying the guarantee, which meant, so the applicant claimed, the guarantee should not be paid out. In support of this allegation and in order to bolster their case, the applicant in its founding affidavit drew my attention to the fact that the first respondent had on a previous occasion attempted to cash in the guarantee. The second respondent however refused the demand for the pay – out on that occasion on the basis that the first respondent has failed to comply with the formal requirements and the letter of the guarantee in that the demand by the first respondent for payment did not contain a ‘statement setting out the facts that constitute the default’, as it was required to do in terms of the guarantee. Also, the applicant referred me to the pending litigation between the applicant and the first respondent in order to demonstrate that there is a dispute relating to the applicant’s liability to the first respondent. The applicant also highlights certain discrepancies in the demand by the first respondent.

[3]. The second respondent had indicated to the applicant that, in its view, the second demand for payment by the first respondent on the guarantee was valid at least in form and that they (the second respondent) therefore intended complying with the demand by paying out the amount of the guarantee, namely R400 000. The payment, so the second respondent advised the applicant, would be made to the first respondent, during the course of the morning of Wednesday, the 16th of May 2018. The first respondent was not prepared to give an undertaking not to cash in on the guarantee pending determination by a court of law of the liability of the second respondent to pay out on the guarantee, and this necessitated the applicants to launch the application on the evening of Tuesday, the 15th of November 2018.

[4]. Having heard the application in the absence of the respondents, I granted the above order at about 19:00 on the evening of Tuesday, the 15th of May 2018. In view of my findings relative to the merits of the application, I do not deem it necessary to dwell on the reasons for the non – appearance at the hearing of the application on the evening of the 15th May 2018. Suffice to say that the first respondent through its Counsel, Mr Bekker, advised me that the first respondent never received the written notice of motion indicating that the application would be heard on that evening.

[5]. Central to the dispute between the parties is the legal question whether in the context of a ‘performance guarantee’ the contractor, in this case the applicant, has the right to prevent the guarantor, in this case the second respondent, who is satisfied that it should pay out on the guarantee, from allowing the guarantee (the first respondent) to cash in the guarantee. Put differently, can a person who is not a party to the guarantee interfere in that contractual arrangement on the basis that the reason for the existence of the guarantee had for example fallen away?

[6]. In answering that question I find myself in agreement with most, if not all of the submissions made by Mr Bekker on behalf of the first respondent. I intend borrowing quite liberally from his heads of argument. However, before dealing with the applicable legal principles, it may be apt at this point to deal with the provisions of the Guarantee. The relevant provisions read thus:

‘1. We, the undersigned,, of Nedbank Limited, Reg no: 19611000009106 (hereinafter referred to as "the Guarantor")

and duly authorised hereto, do hereby bind the said bank as Guarantor to Transnet SOC Limited (hereinafter referred to as "Transnet")

for the due payment of every sum of money which may now or at any time hereafter be or become owing by The New Reclamation Group (Pty) Ltd, Reg No. 20051041029107 (hereinafter referred to as "the Debtor") to Transnet arising out of a credit agreement for Transnet Freight Rail (hereinafter referred to as "the Contract") entered into between the Debtor and Transnet and to which this guarantee forms an annexure, provided that, notwithstanding anything to the contrary herein contained, the total

amount recoverable by Transnet from the Guarantor hereunder shall not exceed the sum of R400,000.00 (FOUR HUNDRED THOUSAND RAND)

(hereinafter referred to as "the Guaranteed Amount").

2. The Guarantor hereby renounces the benefits of the legal exceptions of excussion and division which might be pleaded against the validity of this guarantee and hereby acknowledge that the full force and effect of these renunciations are fully known to the Guarantor.

3. This guarantee shall establish a continuing covering liability and shall remain of full force and effect notwithstanding any fluctuation in the indebtedness of the Debtor to Transnet or even the temporary extinction thereof.
4.
5. The Guarantor's liability hereunder shall not be limited to the principal sum of any indebtedness of the Debtor to Transnet but shall, subject to the terms hereof, also cover all other amounts making up the indebtedness, Including in particular interest, commissions, stamps, legal costs and collection fees,
6. It shall at times be in the discretion of Transnet to determine the extent, nature, duration and terms of any facilities to be allowed to the Debtor.
7. The Guarantor will make payment In terms of this guarantee upon receipt and its domicilium address,, of a written demand from Transnet. Such demand must contain a statement setting out the facts that constitute the default. It will not be incumbent on the Guarantor to determine the accuracy of such facts or the authority or Identification of the signature that may appear thereon.
8. Any claim by the Debtor for loss of or damage to the goods or for alleged overcharges or for any other cause whatsoever, shall not defer, postpone or otherwise Interfere with the Guarantors liability for prompt payment to Transnet of any claim made under this guarantee.
9. Notwithstanding anything to the contrary herein contained, the Guarantor's obligations hereunder shall be construed as principal and not as accessory to that of the Debtor and shall not be delayed or discharged by the fact that a dispute exists between the Debtor and Transnet.
10.
11.
12.
13. This guarantee shall be governed by and construed in accordance with the laws of the Republic of South Africa and shall be subject to the jurisdiction of South African Courts.'

[7]. As I indicated supra, the applicant applied for and was granted an order interdicting the first respondent from claiming monies from the second respondent

under and in terms of the guarantee. It is worth noting that the second respondent, Nedbank Limited, is quite prepared to pay out

pursuant to the guarantee as it believes that the conditions for payment have been met. The applicant, on the other hand, contends

that it (the applicant) does not owe the first respondents any money and therefore the guarantee should not be paid. The question is whether the contention on behalf of the applicant is legally sound and sustainable. That question can be answered by having regard to the applicable legal principles relating to the nature and legal consequences of a guarantee.

[8]. In *Phillips & Ano v Standard Bank Of South Africa Ltd & Others*, 1985(3) SA 301 (W), the court dealt with an application to stop payment under a letter of credit because the goods delivered were

defective. The application was refused. Goldstone J held as follows:

‘In my opinion the documentary credit issued in this case does indeed constitute a contract independent of the contract of purchase and sale between the applicants and the third respondent. In respect of that question, the dicta I have cited from the *Sztejn* and the *Royal Bank of Canada* cases appear to me to correctly reflect our own law, as well as the correct approach which should be adopted by our Courts.’

[9]. Mr Bekker also referred me to the judgment of Scott AJA in *Loomcraft Fabrics CC v Nedbank Ltd & Another*, 1996(1) SA 812 (A), in which the AD remarked as follows relative to the interpretation of guarantees:

‘The system of irrevocable documentary credits is widely used for international trade both in this country and abroad. Its essential

feature is the establishment of a contractual obligation on the part of a bank to pay the beneficiary under the credit (the seller) which is wholly independent of the underlying contract of sale between the buyer and the seller and which assures the seller of payment of the purchase price before he parts with the goods forming the subject matter of the sale.

The unique value of a documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or for that matter even the existence of the underlying contract, by issuing or confirming the credit, the bank undertakes to pay the beneficiary provided only that the conditions specified in the credit are met. The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit. In the event of the documents specified in the credit being so presented, the bank will escape liability only upon proof of fraud on the part of the beneficiary.’

[10]. In *FirstRand Bank Ltd v Brera Investments CC*, 2013(5) SA 556 (SCA), it was held as follows:

‘The guarantee in question – consisting as it did of an undertaking to make payment of an amount of money on the happening of a specified event – was of the same nature as a performance guarantee, performance bond or letter of credit. The autonomy of a guarantee of this nature was well recognised; it must be paid according to its terms. It was only where fraud was involved that the issuing institution may decline liability, and in the present case no such issue arose.’

[11]. In *Petric Construction CC t/a AB Construction v Toasty Trading t/a Furstenburg Property Development and Others*, 2009(5) SA 550 (ECG), a dispute arose between the applicant and the first respondent as to the validity and legality of the first

respondent's purported termination of the principal building agreement, which issue was referred to arbitration. Pending resolution of the dispute, the applicant approached the High Court on motion for an order restraining the second and third respondents from

paying the first respondent any amount claimed by the first respondent in terms of the construction guarantee. The application

was granted in the form of a rule nisi.

[12]. Sandi J held that the alleged disputes between the applicant and the first respondent were irrelevant to the construction guarantee, that the first respondent had complied with the provisions of the construction guarantee, and, there being no evidence that the first respondent had committed fraud, the second respondent was obliged to comply with the terms thereof. At par [27] the Court remarked as follows:

‘The alleged disputes between the applicant and the first respondent are irrelevant to the construction guarantee. Irrelevant too is clause 36.6 of JBCC Contract which prohibits cancellation of the agreement by the respondent on the ground of a material breach of the JBCC agreement. The second respondent, the guarantor, is not taking part in these proceedings and has not alleged any reason why it should not pay the guarantee to the first respondent. It is the applicant that invites the court to go behind the terms of the guarantee. The court cannot do so. The parties to the guarantee are the first and second respondents. The applicant plays no part in it.’

[13]. Applying these principles in casu, I find that, by issuing the guarantee the second respondent shifted the risk from the first respondent and at the same time incentivised the applicant against defaulting in its performance under the agreement. It is a form of security. In essence, the applicant, who is not a party to the guarantee, cannot prevent payment of the guarantee amount by the second respondent when all the requirements of the guarantee have been met, save for instances of fraud.

[14]. It is not for the applicant, who is not a party to guarantee, to stop payment on the guarantee on the basis that a fraud has been committed. That is the prerogative of the bank, who in casu is quite happy to pay out on the guarantee.

[15]. I am therefore of the view that on the basis of the foregoing authorities and legal principles, the applicant does not have a prima facie right, which entitled it to the interim interdict I granted in its favour on the 15th of May 2018.

[16]. Uniform Rule 6(12)(c) provides as follows:

'A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.'

[17]. In relation to Rule 6(12)(c) the Court (Farber AJ) in *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others*, 1996 (4) SA 484 (W) at 487B, had this to say:

'The framers of Rule 6(12)(c) have not sought to delineate the factors which might legitimately be taken into reckoning in determining

whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence of the aggrieved party, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress can be attained by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein.'

[18]. I am in full agreement with this enunciation by Farber AJ of the principles relating to the application of the said rule.

[19]. Having considered all of the foregoing, I am of the view that the urgent interim order granted by me on the 15th of May 2018 should be reconsidered and replaced with an order dismissing the applicant's urgent application. The order should

be set aside.

Costs

[20]. The first respondent is successful in its opposition to the applicant's urgent application. This means that, applying the general rule, it is entitled to a cost order.

[21]. I can see no reason to deviate from the general rule and cost should therefore be awarded in favour of the first respondent, which cost should include the cost consequent upon the use of two Counsel.

ORDER

In the result, I make the following order:-

1. The Order of this Court of the 15th May 2018 be and is hereby reconsidered in terms of Uniform Rule of Court 6(12)(c), set aside and replaced with the following order:-

‘1. The applicant’s urgent application be and is hereby dismissed.

2. The applicant shall pay the first respondent’s cost of the urgent application, including the cost consequent upon the employment of two Counsel’.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 15th & 18th May 2018

JUDGMENT

DATE: FOR THE APPLICANT: 23rd May 2018 Adv J L Kaplan INSTRUCTED BY: Ian Levitt Attorneys
FOR THE FIRST RESPONDENT: Adv S J Bekker, together with: Adv O Motaung INSTRUCTED BY:
Malebeye Motaung Mtembu Inc

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