

SOUTH AFRICA / JUDGMENT

Transnet SOC Limited v Absa Insurance Company Ltd and Others (08853/2016) [2019] ZAGPJHC 476 (24 October 2019) [2019] ZAGPJHC 476

COURT

South Gauteng High Court, Johannesburg

BEFORE

C G Lamont

CASE / FILE NUMBER

08853/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 08853/2016

In the matter between:

TRANSNET SOC LIMITED Applicant

and

ABSA INSURANCE COMPANY LTD First Respondent

REFINE UNDERWRITING MANAGERS PTY LTD Second Respondent

INTERSHORE-AFRICA TRADING PTY LTD Third Respondent

(In Liquidation)

J U D G M E N T

LAMONT, J:

- [1] This is an application brought by the applicant to enforce the rights conferred upon it under a performance guarantee issued by the second respondent on behalf of the first respondent. The applicant has withdrawn the application against the second respondent and proceeds only against the first respondent.

[2] The application was launched during 2016 and has been pending for some 3 years. During the course of the proceedings there have been interlocutory applications particularly with regard to documents which the first respondent required the applicant to produce.

[3] During March 2014 the contractor was placed under business rescue. During the course of the business rescue proceedings it became

apparent that the contractor had sought to make arrangements with its creditors. The attempt by the contractor to seek to make an arrangement with its creditors constituted a breach of the terms of the contract. In consequence the applicant terminated the contract during March 2014. The right of the applicant to terminate the contract was not disputed by the contractor. The first respondent also accepted that the contract was terminated in consequence of its conduct in seeking to make an arrangement with its creditors. As at the date of termination of the contract the contractor had neither fulfilled its obligations in terms of the contract nor raised any dispute about whether or not the foundations on which the structures (tanks) which it was to build were inadequate to enable it to complete to work and whether or not the work was capable of performance.

[4] In due course the contractor's indebtedness was assessed by the project manager who certified payment due to the applicant in the sum approximately R196.6 million. That amount remains due, owing and payable by the contractor to the applicant. The final payment certificate remains in full force and effect and is binding on the applicant and the contractor.

[5] During April 2015 the applicant made a call on the first respondent under the performance guarantee for payment of the amount due by the contractor (referred to as the supplier). There is no dispute between the parties that the terms of the performance guarantee were complied with and that on the face of it the first respondent is obliged to make payment.

[6] The relevant terms of the performance guarantee are set out below:-

"1.3 "Contract" – means the written agreement relating to the providing of goods and services entered into between the Purchaser and Supplier....as amended, varied, restated novated or substituted from time to time;

2 At the instance of the Supplier we the undersigned... confirm we hold the Guaranteed Sum at the disposal of The Purchaser, as security for the proper performance by the Supplier of all of his obligations in terms of and arising from the Contract and hereby undertake to pay to The Purchaser, on written demand from The Purchaser received on or before expiry date any sum... not exceeding the guaranteed sum.

4 Notwithstanding the reference here in to the Contract the liability of the Guarantor in terms hereof is as principal and not as surety and the Guarantor's obligations/s to make

4.1 is and shall be absolute and unconditional in all circumstances; and

4.2 is not, and shall not be construed to be accessory or collateral on any basis whatsoever.

5 The Guarantor's obligations in terms of this Guarantee:

5.1 shall be restricted to the payment of money only... And

5.2 shall not be discharged and compliance with any demand for payment received by the Guarantor in terms hereof shall not be delayed by the fact that a dispute may exist between The Purchaser and the Supplier

6 The Purchaser shall be entitled to arrange its affairs with the Supplier in any manner which it sees fit, without advising us and without affecting our liability under this Guarantee. This includes, without limitation, any extensions, indulgences, release or compromise granted to the Supplier or any variation under or to the Contract."

[7] The first respondent refuses to make payment on the basis of a claim that the performance guarantee contains these tacit terms:-

1 the contractor's performance had to be factually possible failing which the performance guarantee was null and void

2 the applicant was only entitled to receive payment under the performance guarantee if it was able to and had the intention of proceeding to complete the works in accordance with the scope of its contract with the contractor,

3 the applicant was not entitled to payment under the performance guarantee where it intended to apply the monies received to rectify defective foundations rather than to procure substitute performance of the contractor's obligations

[8] A tacit term of a contract is one that is not stated in words in the contract but was intended by both parties to form part of the contract. It is "an unexpressed provision of the contract that derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court in truth declares the whole contract entered into by the parties." See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA at 531. A tacit term may be actual or imputed. It is actual if the parties in fact thought about the term and did not include it because it was so obvious. It is imputed if the parties did not consciously direct the minds to the issue, but must necessarily have agreed the term if their attention had been drawn to it. See *Techni -Pak Sales (Pty) Limited v Hall* 1968 (3) SA 231 (W) at 236. The existence of a tacit term is determined by inference by reference to the express terms of the agreement and the surrounding circumstances. While a witness can on occasion give useful and relevant information generally such information given by way of oral evidence of a witness is unhelpful. See *Richard Ellis South Africa (Pty) Limited v Allen* 1990 (1) SA 453 (T) at 460D.

[9] The performance guarantee is an independent contract, independent of the construction contract. The bank deals in money not in the assessment and evaluation of the merits or demerits of the contract underlying the obligations to make payment. See *Eskom Holdings v Hitachi Power Africa* [2013] ZASCA 101 at paragraph 15.

[10] The performance guarantee is similar in nature to a letter of credit. See: *Minister of Transport and Public Works, Western Cape, and Another v Zanbuild Construction (Pty) Limited* 2011 (5) SA 528 (SCA) at paragraph [13] It is well-established that:-

“when a letter of credit is issued and confirmed by the bank, the bank must pay it if the documents are in order and the terms of the creditor satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit..... To this general principle there is an exception in the case of what is called established or obvious fraud to the knowledge of the bank” see Edward Owen Engineering Limited [1978] All ER 976 (CA). See also Coface South Africa Insurance Co Limited v East London Own Haven 2014 (2) SA 382 (SCA) at paragraph 10 and 11.

[11] The matter was also dealt with in *Compass Insurance Co. Limited v Hospitality Hotel Developments (Pty) Limited* [2011] ZASCA 149, 2012 (2) SA 537 (SCA) with reference to *OK Bazaars (1929) Limited v Standard Bank of African Limited* it was held:-

“[The bank’s] interest is confined to ensuring that the documents that are presented conform with its clients instructions (as reflected in the letter of credit) in which event the issuing bank is obliged to pay the beneficiary. If the presented documents do not conform with the terms of the letter of credit the issuing bank is neither obliged nor entitled to pay the beneficiary without its customers consent. The obligation of the issuing bank was expressed as follows in Midland Bank Limited v Seymour [1955] 2 Lloyd’s Rep 147 at 151:

“there is, of course, no doubt that the bank has to comply strictly with the instructions that it is given by its customer it is not for the bank to reason why. It is not for it to say:

“this, that or the other does not seem to us very much to matter” it is not for it to say:

“what is on the bill of lading is just as good as what is in the letter of credit and mean substantially the same thing”

all that is well-established by authority. The bank must conform strictly to the instructions which it receives.”....

A bank which gives a performance guarantee must honour the guarantee according to its terms.”

[12] The courts have continuously underlined that the obligation established in the performance guarantee is wholly independent of the underlying contract. In this way assurances are given for the payment of the price before the time for payment.

“The only basis upon which the bank can escape liability is proof of fraud on part of the beneficiary. This exception falls within a narrow compass and applies unless the seller for the purpose of drawing on the creditor, fraudulently presents to the bank documents that to the seller’s knowledge misrepresent the material facts” see Lombard Insurance Co Limited versus Landmark Holdings Pty Limited and Others 2010 (2) SA 86 (SCA) at paragraph 20.

[13] The second and third tacit term alleged relate to questions concerning what the applicant may or may not do with the proceeds of the performance guarantee. The evidence which is before me does not establish the existence of these terms. Indeed it would be surprising if such terms existed. It is for the applicant to determine what it will do with the proceeds of the performance guarantee and how the monies are to be used.

[14] It is the first tacit term alleged to exist which presents great difficulty. The submission was that if the underlying construction

contract is void, there is no contract to be performed by the contractor hence no defective performance and hence no damages. It

would accordingly not be possible for the applicant to issue the document in the terms required by the performance guarantee. The

facts before me show the existence of a construction contract, its cancellation and the issue of a document by the project manager

reflecting an indebtedness on the part of the contractor. The first respondent submits that I must consider facts which are disputed by the applicant which it alleges constitute an impossibility of performance. Impossibility of performance is to be objectively

determined hence so the argument goes I must look at the facts and see objectively whether performance was possible.

[15] The performance guarantee is a document obtained from the first respondent at the instance of the contractor which provides for payment by the first respondent as against production of a demand as contemplated by the performance guarantee. The performance guarantee contemplates a demand referring to a particular identified contract. Whether or not the contract exists in an enforceable form or not, is irrelevant to the identification issue. The demand must state no more than the amount due to the applicant by the contractor. The fact that the right to payment may be disputed by the contractor is not a consideration entitling the first respondent to withhold payment. The trigger for payment by the first respondent is the demand. Whether or not the applicant is actually entitled to be paid under the construction contract has no bearing on the matter. It may be that the applicant is not entitled as against the contractor to receive payment. The only concern of the first respondent is to determine whether or not in terms of the demand document, the allegations required by the performance guarantee are contained in the document. The applicant would never have agreed to the importation of duties from the contract into the performance guarantee. Such an agreement would involve allowing the first respondent an

external party powers of interfering in the contract. It would entitle the first respondent for example, to, midway in performance by the contractor claim the contract was void and stop performance. The tacit term would potentially vest controls in the contractor's performance and would also pollute the simple trigger which fires the bullet to get performance from first respondent, namely the demand document contemplated by the guarantee. In my view, there is no room for the tacit term claimed by the first respondent.

[16] Accordingly all the evidence concerning whether or not the construction contract was capable of performance is irrelevant as

this issue is not before me.

[17] In any event and whether or not the contract was capable of performance. The contract was capable of partial performance in that the complaints relate to two out of three tanks only. The contract in relation to one tank could be performed. That tank was to be refurbished. The contract in relation to the other two tanks was capable of performance even if the contract remained un-amended (at best for the first respondent), as a defective result would be achieved. The result which could be achieved was that two tanks would be constructed on imperfect bases which would be unable to bear the weight of the tanks. This notwithstanding the works were capable of being executed by the contractor to produce an imperfect result. Hence there was no absolute impossibility of construction.

[18] The point is that the impossibility alleged by the first respondent and disputed by the applicant concerns the issue of whether the works could be executed to achieve the result required by the applicant, not whether or not the work could be executed at all.

[19] The contract itself provides for a mechanism which reflects the owner's and contractor's continuing common intention if the result required by the applicant could not be achieved. The parties to the contract foresaw that the terms of the contract might require adjustment to cater for the contractor to achieve the desired result, i.e. in this case an amendment to its terms so that the structures could be erected on an appropriately designed base. That mechanism is contained in clause 7 of the contract which provides that the performance required of the contractor can be varied to achieve the result required. Accordingly if the base of the structures was inadequately designed new designs could be obtained enabling the base to bear the weight of the structures (that being the problem). It is too simplistic to say that as at contract date a flaw existed and ignore the fact that the contract was designed to overcome the flaw.

[21] I make no punitive order as to costs. The first respondent has raised issues which were not vexatious frivolous or reckless. In these circumstances a party and party costs order is appropriate. Such costs order shall include the costs consequent upon the employ of two counsel where so employed.

[22] The applicant is entitled to relief sought in Notice of Motion namely:-

- 1 The first respondent is directed to pay the applicant the sum of R10,950,000.00.
- 2 That the first respondent is directed to pay the applicant interest on the said sum at the rate of 9% per annum from 19 March 2014.
- 3 That the first respondent is to pay the costs of the application, including the costs of two counsel where employed.

C G LAMONT

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT: Adv. C. McAslin

Adv. S. Tshikila

APPLICANT'S ATTORNEYS: Mncedisi Ndlovu & Sedumedi Inc

COUNSEL FOR THE FIRST RESPONDENT Adv. A.J. Lamplough

RESPONDENT/S ATTORNEYS: Edward Nathan Sonnenbergs Inc

DATE OF HEARING: 14 October 2019

DATE OF JUDGMENT: 24 October 2019

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2019/476.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/transnet-soc-limited-v-absa-insurance-company-ltd-and-others-unknown-topic-agpjhc-2019>

Prepared on 13 October 2026 · Esheria