

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

24/05/2018

DATE

SIGNATURE

Case Number: **7274/2017**

In the matter between:

KALYAN HOSPITALITY DEVELOPMENT TOGO SAU

Applicant

And

SANTAM LIMITED

Respondent

And

**ZPC HOSPITALITY RENOVATION
SPECIALISTS (PTY) LTD**

First Third Party

ZPC AFRICA (PTY) LTD

Second Third Party

ZPC CENTRAL (PTY) LTD

Third, Third Party

ZPC CIVILS (PTY) LTD

Fourth Third Party

ZPC COASTAL (PTY) LTD

Fifth Third Party

ZPC ELECTRICAL (PTY) LTD	Sixth Third Party
ZPC JOINERY (PTY) LTD	Seventh Third Party
ZPC PLUMBING (PTY) LTD	Eighth Third Party
ZPC PROCUREMENT (PTY) LTD	Ninth Third Party
LETLAKE TRADING 513 CC	Tenth Third Party
AIRE CONTROL SUPPLIES (PTY) LTD	Eleventh Third Party
VENTER, CHRISTOPHER SIM	Twelfth Third Party
PAUTZ, ANTHONY JOHN DONNE	Thirteenth Third Party
DU PLESSIS, JOHAN LOUIS	Fourteenth Third Party
ROSSOUW, JACOBUS ADOLF	Fifteenth Third Party
MARAIS, CHRISTIAN BOTHA	Sixteenth Third Party
DAMON, LISA NICOLE	Seventeenth Third Party
VISAGIE, IAN	Eighteenth Third Party
BRITS, DEON JOHAN	Nineteenth Third Party
PRETORIUS, BAREND MATTHEUS	Twentieth Third Party
JANCKE, DIETER HELWIG	Twenty-First Third Party

JUDGMENT

FISHER J:

INTRODUCTION

[1] The applicant, Kalyan seeks payment from the respondent, Santam of USD 5 500 000 with interest and costs, pursuant to the terms of a deed of suretyship

issued by Santam in favour of Kalyan for performance by the first third party, ZPC of its obligations pursuant to a written construction contract. The third parties abide.

[2] Santam brings a counter-application in which it seeks that the suretyship be set aside and costs on the attorney- client- scale.

BACKGROUND

[3] On 7 December 2014 Kalyan and ZPC concluded a written construction contract in terms of which ZPC was required to refurbish a hotel in Togo for a contract price of USD 5 500 000. It was a term of the contract that ZPC would procure security for its performance thereunder. On 30 January 2015, at the request of ZPC, Santam issued a written deed of suretyship in terms of which Santam bound itself to Kalyan as surety and co-principal debtor with ZPC for the due performance of ZPC's obligations under the contract, in an amount not exceeding USD 5 500 000. This suretyship was due to expire at 12H00 on 15 December 2015, which expiry date catered to the contract completion date on the contract which was 14 December 2015.

[4] When it became obvious that the project would not be completed in time, Kalyan and ZPC began negotiating for, *inter alia*, an extension of the contract period. This would require an extension of the expiry date of the deed of suretyship which guaranteed performance under the agreement.

[5] On 14 December 2015 Santam issued a replacement suretyship on the same terms as this original suretyship, which would expire at 12H00 on 30 April 2016. This is the suretyship in issue herein. It is the circumstances surrounding the procurement of this replacement suretyship that are in issue in this matter.

[6] On the undisputed facts it appears that Kalyan colluded with ZPC to secure the drawing up of a fictitious variation order under the contract which suggested on the face of it, *inter alia*, that certain additional work had been agreed to by the parties to the contract and that this had occasioned the extension of the contract period. The drawing up of this

fictitious document had as its purpose the inducement of Santam to issue the replacement suretyship. This too is not in dispute.

[7] Santam says that it was induced by this fictitious variation order to issue the replacement suretyship as it believed that such extension of time under the building contract had been agreed to in terms of and on the basis of the variation order. Kalyan argues that this version should be rejected by the court on the papers as being untenable. The test for whether a party's allegations creating a dispute of fact are untenable is a stringent one not easily satisfied. The rejection of the respondent's version in motion proceedings should not be undertaken lightly (see *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd*, 2017 (2) SA 1 (SCA)).

[8] It argues further that, in any event, and even if the matter is decided on Santam's version, an extension of the contract was, in fact, granted after the issue of the suretyship and that thus there was no prejudice. Santam on the other hand contends that it was indeed prejudiced in the assessment of its risk in that the terms of the extension as represented by the false variation order were different from the variations to the contract ultimately agreed to and that the former terms made for a more positive risk analysis than the latter would have. Santam contends that, for a start, the variation order suggested that there was additional work to be done which required the extension; whereas the extension agreement which was ultimately reached shows that the reason for the extension of the completion date was the fact that there was a failure to comply with the original project programme.

[9] Santam's contention that it would not have issued the replacement suretyship had it known that the variation order was fictitious cannot be gainsaid by Kalyan on these papers. Furthermore, there is no basis whatsoever for the finding that the version of Santam is untenable or dishonestly made.

COSTS

[10] Santam's attorneys Frese Moll stated in writing in response to a demand for payment under the suretyship, *inter alia*, that "our instructions are that our client is of the opinion that it is not liable to make payment to your client in terms of the guarantee and

that it has been released of its obligations under the guarantee for inter alia the following reasons: Certain false information was presented to our client by the employer's agent, with the full knowledge of your client in order to induce our client to issue the replacement guarantee dated 14 December 2014."

[11] In the circumstances, prior to the launch of this application, Kalyan was pertinently informed that Santam disputed its liability under the replacement suretyship as a consequence of "false information" which "induced" the issue of the replacement guarantee.

[12] Subsequent to the launch of this application and on 24 March 2017, Frese Moll addressed a further letter to the applicant's attorney, ENS, once more notifying Kalyan of the dispute of fact and putting it to the customary election of a withdrawal of the application failing which Santam would seek a dismissal.

[13] Kalyan has elected to persist in seeking final relief in these motion proceedings. The applicants could have been in no doubt that this matter could not be entertained on application. Notwithstanding this, the applicant has persisted with the application even unto the securing of a special hearing of the matter from the office of the DJP.

[14] The respondent seeks costs on the attorney-client- scale. A court will grant costs on a punitive scale, not only in instances where the court wishes to mark its displeasure of the losing party's conduct, but also in instances where the successful party has been put to expense to which it should not have been put. Kalyan was aware of the basis upon which this application would be defended at least from the moment of demand. To my mind it took an unreasonable stance in persisting with the application.

[15] The counter- application rests on the same facts for its determination. Such application was necessary only because of the application. It suffers the fate of the main application in that it cannot be decided on the papers.

[16] The respondent raised a defence which dealt with the validity of the claim with reference to whether the contract was validly cancelled. This defence was not persisted with in argument. The applicant contends that, in light of the fact that this defence was not ultimately argued, it should not have to bear the costs associated with this defence and

that in fact it should get its costs in relation to this defence. I disagree. This approach loses sight of the fact that the defence was raised precisely because the respondent was put to dealing with an unreasonable case in the first place. The fact that this aspect was not argued appears to have been in line with the inescapable conclusion that the matter should not have been brought at all and that the main defence raised would certainly be dispositive of the application.

ORDER

[17] I thus order as follows:

1. The application is dismissed;
2. The counter – application is dismissed;
3. The applicant is to pay respondent's costs of the application and the counter - application on the attorney- client- scale.



FISHER J
HIGH COURT JUDGE

GAUTENG LOCAL DIVISION

Date of Hearing: 2- 4 May 2018

Judgment Delivered: 24 May 2018

APPEARANCES:

For the Applicant: Adv CJ McAslin with Adv T Moretlwe Instructed by Edward Nathan Sonnenberg Inc.

For the Respondent: Adv W Luderitz SC with Adv C Vetter Instructed by Frese Moll and Partners.