IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 24814/2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

25 May 2022. .....

In the matter between:

UITSPAN COLLIERY (PTY) LTD Applicant

and

LOMBARD INSURANCE COMPANY LTD Respondent

SUMMARY

Contract – Interpretation of Demand Guarantee – on contextual interpretation having regard to purpose of guarantee, written consent of the mine owner is not a peremptory requirement for purposes of enforcing the guarantee.

JUDGMENT

KATHREE-SETILOANE J:

[1] The applicant, Uitspan Colliery (Pty) Ltd ("applicant") seeks payment from Lombard Insurance Company Ltd ("respondent") in the amount of R10 000 000.00 on the basis of a financial guarantee ("guarantee") issued by the respondent in favor of the applicant for the rehabilitation of land disturbed by mining.

[2] On 23 July 2020 the applicant duly claimed the guaranteed amount. The respondent, however, denies liability on the basis that the applicant's demand for payment under the guarantee does not comply with the requirements of the guarantee because it was not accompanied by written consent from the mine owner, African Coal Trading Pty Ltd ("ACT").

Terms of the Guarantee

[3] The material terms of the guarantee are as follows:

> **FINANCIAL GUARANTEE FOR THE REHABILITATION OF LAND DISTURBED BY MINING (EXECUTION OF ENVIRONMENTAL MANAGEMENT PLANS/PROGRAM)**
>
> 1. Concerning the responsibility in terms of the Mineral and Petroleum Resources Development Act 28, 2002, which is incumbent on
>
> **AFRICAN COAL TRADING (PTY) LTD**
>
> ...
>
> (hereinafter referred to as 'the mine owner')
>
> to execute the environmental management plan / programme approved in terms of the provisions of the said Act for the mine known as
>
> **UITSPAN COLLIERY**

situated in the Magisterial District of **WITBANK** Province **MPUMALANGA**, we the undersigned … in our capacities as **UNDERWRITING MANAGER: LOMBARD GUARANTEE** and **LEGAL MANAGER: LOMBARD GUARANTEE** and as duly authorised representatives of

LOMBARD INSURANCE COMPANY LIMITED(Reg. No. 1990/001253/06)

(hereinafter referred to as "the Guarantor")

confirm that the amount of **R 10 000 000.00 (Ten Million Rand Only)** is available to you for the purpose of executing the said environmental management plan / programme.

2. The Guarantor, who hereby waives the advantages of the exceptions, *non numerate pecuniae, non causa debiti, excussionis et divisionis*, the meaning and the consequences of which is known to the Guarantor, undertakes to pay to you the said sum of **R 10 000 000.00 (Ten Million Rand Only)** upon receipt of a written claim from you together with written consent from African Coal Trading (Pty) Ltd if (in your opinion and discretion) the mine owner fails or remains in default to execute the said environmental management plan / programme, or if he ceases mining/prospecting operations, or if his estate is sequestrated, or if he should hand over his estate in terms of the Insolvency Acts which are applicable in the Republic of South Africa, or if the Guarantor gives written notice to you in terms of Clause 5 of this agreement. The said claim may be instituted by you at any stage commencingfrom the date of signature of this guarantee.

3. The said amount of **R 10 000 000.00 (Ten Million Rand Only)** may be held by you on the condition that you, after having complied with all the provisions of the said environmental management plan / programme, will give account to the Guarantor of how the amount was appropriated and repay any unappropriated amount to the Guarantor.

4. This undertaking is neither negotiable nor transferable and -

    a) must be returned to the Guarantor when giving account to the Guarantor in terms of Clause 3 above,

    b) shall lapse on the granting of a closure certificate in terms of the Mineral and Petroleum Resources Development **Act, 2002 (Act 28 of 2002)** and

    (c) shall not be construed as placing any other responsibility on the Guarantor other than the paying of the guaranteed amount.

5. The Guarantor reserves the right to withdraw from this guarantee after having given you at least **three months** written notice in advance of his intention to do so.

…"

Common Cause Facts

[4] The applicant is the registered mining right holder over portions of a farm upon which the mine is located ("the Mine"). It appointed Iningi Coal (Pty) Ltd ("Iningi") as manager of the Mine. Iningi and the applicant contracted with ACT to undertake the mining of the coal at the Mine.

[5] As contractor, ACT undertook in terms of clause 16 of the Mining Agreement certain rehabilitation obligations in respect of the Mining Area. In terms of clause 16.2 of the Mining Agreement, the applicant as the holder of the mining right, is obliged to make financial provision for the rehabilitation in compliance with the provisions of the Mineral and Petroleum Resources Development Act 28 of 2002, as amended ("MPRDA") and the MPRDA Regulations.

[6] Clause 16.4 of the Mining Agreement requires ACT, as the contractor, to make payment of R20.00 per tonne of coal, mined on the Mining Area and weighed over the weigh bridge, into a nominated attorneys trust account in terms of section 78(2)(A) of the Attorneys Act "… for the sole purpose of Rehabilitation for final closure".

[7] Clauses 16.1 and 16.7 of the Mining Agreement imposed express obligations on ACT to rehabilitate the Mining Area. Its *"Rehabilitation Obligations"* are defined in clause 1.1.43 of the Mining Agreement.

[8] ACT, however, failed to comply with its obligations in terms of clause 16.4 of the Mining Agreement to pay the required amounts into the trust account. It also failed to perform its rehabilitation obligations under the Mining Agreement.

[9] However, as an interim measure, ACT procured the guarantee from the respondent which is central to this application. The guarantee did not amount to a discharge of ACT's obligations, but was rather additional security for its failure to comply with its obligations, in terms of clause 16.4 of

the Mining Agreement , to pay the required amounts into the nominated attorney's trust account.

[10] As a result of ACT's breach, the applicant cancelled the Mining Agreement on 10 July 2020. At that date, ACT was indebted to the applicant in terms of clause 16.4 of the Mining Agreement in an amount of R28,040,000.00 based on 1,402,000 tonnes of coal invoiced up to 31 May 2020.

[11] ACT was insolvent and was placed under provisional liquidation by order of Court on 14 July 2020.

[12] The applicant presented the guarantee to the respondent for payment on 23 July 2020. The respondent disputed that the applicant had complied with the terms of the guarantee because there was no accompanying written consent from ACT as purportedly required in terms of clause 2 of the guarantee.

Issue for determination

[13] The only issue for determination is whether the applicant's demand for payment under the guarantee complied with the requirements of the guarantee. This calls for the interpretation of the guarantee.

Parties contentions

[14] The respondent denies liability on the basis that the claim was not accompanied by the written consent from ACT. It contends that the express

term of the guarantee provides that the respondent must receive a claim together with the written consent from ACT. The applicant, on the other hand, contends that it is not a requirement of the guarantee that the written consent of ACT be provided. Such an interpretation, so it argues, would completely undermine and negate the whole purpose of providing the guarantee which was to secure the rehabilitation obligations of ACT, as in the absence of the consent of ACT the guarantee could never be called up.

Nature of Guarantee

[15] In *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd*,[1] the SCA held that the terms of the guarantee itself will determine its nature, and that the guarantee in that case was "an independent contract" that had to be fulfilled on its terms.

[16] It is common cause that the guarantee in this application is a demand guarantee which is an independent contract that requires fulfilment on its terms. Particularly, once its terms have been fulfiled by the applicant, there is no entitlement on the part of the guarantor (the respondent in this case) to enquire whether there is a liabity. In other words, there can be no inquiry into the merits of the applicant's claim for payment under the guarantee.

Interpretation of the Guarantee

[17] As held in *Bombardier Africa Alliance Consortium v Lombard Insurance Company Ltd and Another,*[2] the terms of the guarantee in question must be

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[1] *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 (2) SA 537 (SCA) para 15.

[2] *Bombardier Africa Alliance Consortium v Lombard Insurance Company Ltd* 2021 (1) SA 397 (GP) at p 403

interpreted in accordance with the interpretative approach articulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[3] This approach was more recently summarised by Wallis JA in *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* as follows: [4]

> "An objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. … That inevitable point of departure is the language used in the provision under consideration."

[18] As explained by Wallis JA in *Endumeni*:

> "[18] …The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these

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[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18. Approved by the Constitutional Court in *Airports Company of South Africav Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1(CC) para 29.

[4] *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) para 8.

> factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. …"

[19] In terms of the financial guarantee, the respondent (as guarantor) confirmed that the amount of R10,000,000.00 (Ten Million Rand) was available to the applicant for the purpose of executing the approved environmental management plan which was to be executed by ACT on the Mine.

[20] The guarantee distinguishes between the requirement of the demand and the events which would entitle the applicant to make a claim. In terms of clause 2 of the guarantee, the respondent undertakes to pay to the applicant the sum of R 10 000 000.00 upon receipt of a written claim from the applicant together with written consent from ACT if in the applicant's opinion and discretion one of the stated events has occurred, namely:

20.1 If ACT fails or remains in default to execute the environmental management plan/programme; or

20.2 If ACT ceases mining/prospecting operations; or

20.3 If ACT's estate is sequestrated; or

20.4 If ACT should hand over its estate in terms of the Insolvency Acts which are applicable to the RSA; or

20.5 If the guarantor (the respondent) gives notice in terms of clause 5 to withdraw from the guarantee.

[21] The respondent contends that, on a plain grammatical meaning of clause 2, the respondent would only be liable to pay in terms of the guarantee if an event, as contemplated in clause 2 of the guarantee, has occurred and the applicant has made a claim accompanied by the written consent of ACT. It contends, in this regard, that the written consent of ACT is a peremptory requirement.

[22] The applicant, to the contrary, contends for a disjunctive interpretation of clause 2 of the guarantee. It submits that clause 2 of the guarantee contemplates different scenarios triggering an obligation on the part of the respondent to make payment. These scenarios, so it argues, are expressed disjunctively and include not only a demand on the respondent accompanied by the written consent of ACT but also, and independently, ACT's failure to execute the environmental management plan/programme or remaining in default of such obligations, or in the event of ACT ceasing mining/prospecting operations or in the event of ACT's estate being "*sequestrated*" or in the event of its estate being handed over in terms of the applicable insolvency laws of the Republic. Each one of these categories, according to this argument, would be sufficient to trigger an obligation to make payment under the guarantee otherwise there would be an uncommercial and insensible result.

[23] The contention thus advanced is that it could not conceivably have been contemplated that, in the event for instance of ACT being liquidated or surrendering its estate in terms of the insolvency laws of the Republic, that it would be required to provide consent for the enforcement of the guarantee. The purpose of the guarantee, so the applicant points out, was to provide security and in the event of ACT withholding such consent for any reason whatsoever, there would be no security afforded by the guarantee. The applicant contends that this is the insensible and absurd result that would flow from the interpretation which the respondent contends for.

[24] As I understand it, the applicant's argument is that the trigger events are independent from the requirement that the claim must be accompanied by the written consent of ACT. On this interpretation, the words "upon receipt of a written claim from you together with written consent from African Coal Trading (Pty) Ltd" would, in itself, constitute a trigger event for the purpose of rendering the respondent liable. I disagree as a written claim and written consent from ACT constitute the requirements of the demand, and are directly and expressly linked with each trigger event through the use of the word "if," which means "on the condition or supposition that or in the event that". [5]

[25] The crucial question, however, is whether written consent from ACT is a peremptory requirement of the quarantee. For the purposes of interpreting the guarantee in a manner that is sensible and businesslike, and promotes the purpose and object of the guarantee, it is important to have regard to the context in which the guarantee was issued by the respondent and the objective circumstances, i.e. the written Mining Agreement with the rehabilitation obligations undertaken by ACT.

[26] The purpose of the guarantee was clearly to provide security in the event that ACT does not comply with the terms of the environmental management plan. The respondent argues that written consent from ACT is a mandatory requirement as there is no other alternative objective criterion specified in the guarantee (such as for instance an independent minining surveyor or a court order) to determine whether one of the specified trigger events has taken place.

[27] If the purpose of requiring written consent from ACT is to confirm that a trigger event in clause 2 of the guarantee has occurred, then it is understable why this may be a requirment in relation to the first two trigger events, namely that in the discretion of or opinion of the applicant ACT "has failed or remains in default to execute the environmental management

[5] "if" means "on the condition or supposition that or in the even that" (Oxford English Dictionary).

plan or that it has ceased mining/prospecting operations on the Mine. Where the happening of these events are based on the applicant's subjective view, and are not objectively ascertainable, then the need for securing ACT's written consent may serve as an important check and balance. Consent may, however, be unnecessary where it is objectively ascertainable and/or common cause (as it is in this case) that ACT has, for instance, failed to execute the environmental management plan. Securing written consent from ACT would be superfluous in this situation.

[28] Equally, the written consent of ACT would be unnecessary in relation to the remaining trigger events listed which are objectively ascertainable, such as ACT being liquidated or surrendering its estate in terms of the insolvency laws of the Republic, or that the respondent (guarantor) has given notice in terms of clause 5 to withdraw from the guarantee. It is inconceivable that written consent was contemplated for the enforcement of the guarantee in these specific circumstances.

[29] To read the words ""upon receipt of a written claim from you together with written consent from African Coal Trading (Pty) Ltd" as signifying that written consent is mandatory even where the specified trigger event is objectively ascertainable, would negate the very purpose of the guarantee which is to provide security to the applicant in the event that one of the specified trigger events occurs. This phrase must not be interpreted in isolation but must be considered in the context of: (a) the whole guarantee itself; (b) ACT's obligations under the Mining Agreement to make financial provision for the rehabilitation of the Mine; (c) ACT's obligations under the MPRDA to execute the rehabilitation plan for the Mine, and (d) the purpose of the guarantee which is to provide security to the applicant in the event that ACT fails to comply with its rehabilitation obligations in terms of the rehabilitation plan.

[30] Construed in context, the requirement for written consent in clause 2 of the guarantee is directory and not peremptory. To interpret this requirement as

peremptory would lead to an insensible or unbusinesslike result and undermine the apparent purpose of the guarantee. For one, ACT would be able to thwart the enforcement of the guarantee by simply withholding its consent. Should ACT do this, there would be no security afforded by the guarantee despite its core purpose which is to provide security.

[31] Upon ACT being placed under provisional winding-up on 23 July 2020, ACT's directors became *functus officio* and no longer had any authority to act on behalf of ACT, *inter alia*, to provide any written consent. The respondent asserts that the applicant must seek the written consent from the liquidator. This contention is without foundation, in particular because a liquidator cannot volunteer written consent as it has no power to do so. Moreover, even if authorised to do so by creditors and members, persuading a liquidator to provide consent would require going into the merits of the claim. This would be impermissible, given that we are concerned here with a demand guarantee.

[32] Moreover, ACT has already been placed under final winding-up order since 7 September 2020. Given this state of affairs, it is unclear on what basis the applicant could get an order to compel the Sheriff of the Court to provide written consent. Thus, to interpret the requirement of written consent to be mandatory in these circumstances would negate the very purpose of the guarantee as the applicant would be left with no remedy at all, despite the fact that it is objectively ascertainable that ACT has been wound up by an order of court, and that it has failed to execute the rehabilitation plan for the Mine.

[33] To sum up, on a contextual interpretation that promotes the purpose of the guarantee, it is not a mandatory requirement of the guarantee that the applicant's demand must be accompanied by the the written consent of ACT. Accordingly, the applicant has complied fully with the terms of the guarantee and is entitled to judgment in terms of the notice of motion.

Costs

[34] The applicant seeks costs against the respondent on a punitive scale, on the basis that it has not raised genuine opposition to the applicant's claim. The applicant is not entiled to a costs order on a punitive scale as given the inelegance of the wording of the guarantee, the respondent was entitled to contend that the requirement of written consent is mandatory. Furthermore, that it raised a meritless challenge to the authority of the deponent to depose to the founding affidavit on behalf of the applicant does not, in my view, warrant a punitive costs order against the respondent.

Order

[35] In the result, I make the following order:

35.1 The respondent is directed to make payment to the applicant in the amount of R10 000 000.00 (ten million Rands) together with interest thereon at the rate of 8.75% per annum as from 23 July 2020 to date of payment in accordance with the financial guarantee number M-71101.

35.2 The respondent is directed to pay the costs of the application

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F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION JOHANNESBURG

Counsel for the applicant: Mr A Subel SC

Instructed by: TWB -Tugendhaft Wapnick Banchetti and Partners

Counsel for the respondent: Mr AN Kruger

Instructed by: Frese Gurovich Attorneys

Date of hearing: 27 February 2022

Date of Judgment: 25 May 2022

(Handed down electronically by email to the parties' legal representative and by being uploaded to *CaseLines*).