IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)

REPORTABLE.
Case No. 5178/02

CITY OF CAPE TOWN **Plaintiff**

Vs

LOMBARD INSURANCE COMPANY LIMITED **Defendant**

JUDGMENT: 24 OCTOBER 2005

DAVIS J.
Introduction.
On 9 February 2000 plaintiff's predecessor in title, the Cape Metropolitan Council ('CMC') awarded a tender to a joint venture between Labor Construction Company (Pty) Ltd ('Labor') and South African Focus Project CC ('SAFocus') for certain civil engineering construction work relating to the Cape Flats Waste Water Treatment Works.

The contract, in terms of which the work would be carried out was designated contract No. WW 38/99. On 17 February 2000 defendant issued an institutional guarantee in favour of CMC. The guarantee recorded that Labor had entered or was about to enter into a contract described as Contract No. WW38/99 Defendant undertook to pay the plaintiff the amount of the guarantee in the event, **inter alia**, of Labor being placed under an order of provisional or final liquidation or judicial management. After the award of the tender to the joint venture, on 26 May 2000 Labor and SA Focus concluded a written Joint Venture Agreement. The agreement made it clear that the joint venture was only formed for the purposes of carrying out Contract No. WW38/99. Clause 5 of the agreement provided that 'the board shall provide the financial resources for the execution of the work including the Institutional Guarantee amounting to 10% of the contract value as required in terms of the principal contract'. Pursuant to the award of the tender on 9 February 2000, a written engineering contract was concluded between CMC and the joint venture. Labor was placed in judicial management on 22 May 2001 and was provisionally liquidated on 22 June 2001.

Plaintiff instituted action against defendant for which it sought payment in terms of the guarantee. Defendant's approach was summarized in a letter written on 28 August 2001 in which it stated: 'At all relevant times, we were under the impression that the contract was to be concluded with Labor Construction Company (Pty) Ltd. and were not aware of the fact that the contract was in fact to be concluded with the Joint Venture. This is borne out by the fact that our guarantee refers only to Labor Construction Company (Pty) Ltd. In view of the fact that the contract was not awarded to Labor Construction Company (Pty) Ltd. but rather a joint venture, it was our contention that we were not liable in terms of the guarantee'.

In other words, defendant's case is that it did not guarantee the performance of the joint venture but rather the performance of Labor in relation to a contract entered into or to be entered into between it and plaintiff. As an insurance company, it had no direct interest in the transaction. The only means by which it was able to assess the risk of it being called upon to pay, was an assessment of the principal debtor's financial status and its capacity and capability of performing the work. It was the fact that it was guaranteeing the performance of Labor that defined its obligations and determined the extent and scope of its liabilities.

Plaintiff's Case.

Mr Sholto-Douglas who appeared on behalf of plaintiff, submitted that the key question for determination was whether a valid contract had been concluded between Labor and defendant. If the answer to this question was in the affirmative, the guaranteed events occurred. Accordingly the guarantee should be paid by defendant in terms of the contract. In this connection, Mr Sholto-Douglas referred to the wording of the institutional guarantee. The crucial part of this contract, in his view, was the following:

'WHEREAS

LABOR CONSTRUCTION COMPANY (PTY) LIMITED

(hereinafter referred to as "The Contractor")

Has entered, or is about to enter into a contract with you for the

CONTRACT NO. WW38/99

CIVIL ENGINEERING CONSTRUCTION WORKS FOR THE CONTROL OF

ODOURS AND UPGRADING OF THE PREMARY SLUDGE REMOVAL SYSTEM AND ASSOCIATED CIVIL WORK FOR THE CAPE FLATS WASTWATER TREATMENT WORKS

(hereinafter referred to as "The Works")

And which contract is hereinafter referred to as ("The Contract")

AND WHEREAS as a condition of such contract, you have required that the Contractor furnish to you the additional security of these presents for the due performance of his obligations hereunder.

NOW THEREFORE, these presents witnesseth:

We, the undersigned **CATHARINA CAROLINA ELIZA BELCHER** and **MARIA ELIZABETH LIGGETT** in our respective capacities as **GENERAL MANAGER** and **ADMINISTRATIVE MANAGER** duly representing

LOMBARD INSURANCE COMPANY LIMITED

(hereinafter referred to as the "Guarantor")

Do hereby confirm that the Guarantor holds at your disposal an amount of **R297 806.16** (**Two Hundred and Ninety Seven Thousand Eight Hundred and Six Rand Sixteen Cents)** (hereinafter referred to as "the Guarantee Sum") which shall be payable to you in accordance with the following provisions:-

1. The full amount of this Guarantee, or lesser portion or portions thereof, as you may at any time and from time demand, shall be due and payable to you at your address aforementioned:

    1.1 In the event of the Contractor failing to proceed with and to complete the Works and/or failing during the course of such Works to remove or to remedy defective work or improper materials entirely to the satisfaction of your Engineer.

    1.2 In the event of the Contractor committing any other breach or any of the

obligations imposed upon him in terms of the Contract.

1.3 In the event of an order being granted for the Provision of Final Sequestration of the Contractor's Estate (or its Provisional or Final Liquidation or its Judicial Management if the Contractor is a company).

1.4 In the event of the Contractor committing an "Act of Insolvency" as defined in terms of Section 8 of Act 24 of 1936, as amended.' _

Mr Sholto-Douglas submitted that it was clear from these provisions that Labor had contracted with defendant in terms of a guarantee in respect of Contract No. WW38/99. In this connection, he also referred to the application for the contract guarantee which had been signed by Labor. In this regard, the contract details were required to be included in the application for the contract guarantee. In the application form which was completed, a copy of Contract No. WW38/99 was included

Mr Sholto-Douglas submitted further that, when defendant put its signature to the contract, it could not have failed to realize that it was assenting to a guarantee in respect of a specific contract WW38/99 which had been entered into between CMC and the joint venture.

Defendant's Case.

Mr Lane, who appeared on behalf of defendant, placed great emphasis upon the following declaration by Labor when it completed the application for a guarantee: 'I hereby declare that the details and information furnished for this application, to the best of my knowledge, fairly represent the true state of affairs of the company/business and I authorize the verification of any aspect of this application. I have not concealed any material facts relevant to this application'.

According to Mr Lane, the application by Labor for the guarantee underwent the usual pre-acceptance scrutiny and examination by defendant. The application was considered

on its merits. The facility available to Labor was checked. The identity of the applicant whose work was being guaranteed was ascertained. Defendant examined whether security had been provided by Labor. It satisfied itself that Labor was undertaking work which it had the capacity and capability to perform and the extent to which any work was to be sub-contracted. Based on this assessment, defendant agreed to provide a performance guarantee which it provided on 17 February 2000. Labor however required that the guarantee be altered to include certain maintenance obligations. Consequently, the original guarantee was cancelled and replaced by a guarantee issued on 14 March 2000. Defendant then invoiced Labor on that same day.

In terms of the guarantee it was recorded that Labor, who was defined as the contractor had or was about to enter into contract WW38/99 and that it was a condition of that contract that Labor provided 'additional security….for the due performance of his obligations …hereunder (sic).

Mr Lane contended that, unbeknown to defendant, Labor had concluded a joint venture agreement with SA Focus on 26 May 2000. The joint venture and plaintiff had entered into a written agreement in relation to Contract WW38/99 on 9 June 2000. The joint venture provided **inter alia** that the joint venture was formed in terms of a written agreement and was deemed to have commenced on the date of the signature by the parties. The sole object of the joint venture was to undertake Contract WW38/99. The profit and losses were borne by the parties equally. Labor would provide the financial resources for the execution of the work including the institutional guarantee SA Focus would provide the management team and labour resources which were required on site. The plant would be hired by the joint venture which would endure until all the contractual obligations had been fulfilled and there had been a full and final settlement of all accounts and disputes, if any, between the parties. In the event of any parties to the joint venture being provisionally or finally liquidated, such party would cease to be a party of the joint venture and the remaining party/s which conclude the works.

Mr Lane therefore contended that the defendant had not guaranteed the performance of the joint venture. By contrast, it had guaranteed the performance of Labor in relation to a contract entered into or which was about to be entered into between Labor and plaintiff. Had the fact that Labor intended entering into a joint venture in terms of which an unknown entity (insofar as defendant was concerned) performed the works been pertinently disclosed, the application for the guarantee would have received a different consideration and may well not have been concluded between the parties.

In summary, Mr Lane submitted that there was a substantial difference between the guarantee given in relation to a contract which was to be performed by a contractor whose identity is known to the guarantor and who is known to have the ability and capacity to perform the work and who undertakes the work itself and a partnership, the identity and existence of which was unknown to the guarantor and which sub-contracts the entire work to a partner whose ability and capacity to perform the work and financial

status is unknown to the guarantor. It could never be said that the guarantee was given in relation to a principle obligation which the defendant agreed to guarantee in the event of a particular and identified principal debtor had been breached specified conditions. The guarantee depended upon a breach by a specified party and did not operate on the breach of an obligation, no matter that a party was unknown to the guarantor

Evaluation.

The resolution to this dispute requires an examination of the sequence of events which transpired leading up to the institutional guarantee having been concluded. In late 1999 (the exact date does not appear to emerge from the papers) an invitation to tender was issued by the CMC in respect of the Cape Flats Waste Water Treatment Works. On 13 January 2000 a document entitled 'Formal Tender' was completed by Labor and SA Focus which was described in the document as a joint Venture. On 9 February 2000 the joint venture received a letter from Gibb Africa which was acting for and on behalf of CMC and in which the joint venture was informed, 'We are pleased to advise you that your tender for the construction of the above project has been accepted in the amount of R2 978 061.64.'

The letter also provided the following:
'The necessary institutional guarantee (draft attached) in the amount of R297 806.16 and proof of meeting the insurance requirements referred to in Clause 10 as Special Conditions of Contract shall be submitted to the Council Legal Adviser Attention Mr S Musson…as soon as possible. Please note that, in terms of the Contract you will not be permitted to occupy the site or commence the works until the institutional Guarantee and insurances have been approved'.

A day after this award had been made, Labor applied for the guarantee. Pursuant thereto, it completed the application for a contract guarantee on 10 February 2000 in which both the contract was described and the specific contract number provided. As Ms Belchar, who testified on behalf of defendant and was at the time a general manager of defendant, conceded under cross examination, had the documents which were attached to the applications been properly considered it was clear that it would have been realized that the tender had been awarded to a joint venture. She went on to say that it was 'a source of

embarrassment that we did not find it out'. She accepted that the existence of the joint venture had been disclosed and further that the documentation made available to respondent made it clear that it was to the latter that CMC had awarded the contract. These concessions were clearly properly made, in that all the documentation generated by Gibb Africa referred to the 'Labor/Focus Joint Venture'.

To recapitulate, the essence of defendant's case is summarized in para 5.3 of its plea, namely 'Contract WW38/99 was not entered into between Labor and the plaintiff and accordingly defendant is not indebted to plaintiff as alleged or at all'.

From this pleading, it is clear that this case does not turn on misrepresentation or non disclosure of material information but rather turns on the basis that Labor and the plaintiff did not enter into contract WW38/99 and hence the defendant could not be indebted to plaintiff.

Fundamental therefore to defendant's case is that the guarantee was granted in relation to the principal debtor's obligation in terms of the contract; that is Labor and not the joint venture.

In dealing with the legal position of the guarantee Mr Lane contended that the nature of the guarantee provided by defendant supported defendant's contention that the joint venture was not covered by the guarantee. In this connection he referred to a judgment of **Van Reenen J** in **Basil Reed (Pty) Ltd** v **Beta Hotels (Pty) Ltd and Others** 2001(2) SA 760(C) in terms of which respondent was obliged to indemnify the other contracting party against 'expenses or loss incurred' or to be incurred as a result of the 'non performance or breach of the terms' of the contract. **Van Reenen J** said the following at 766 G: **'**The consequence …is that in terms of the contract guarantee third respondent was liable to first respondent only if and to the extent that in terms of the contract the applicant is liable to the first respondent' But this case, as in the present dispute, turned on a proper construction of the contract. See 766 H.

In the present dispute, Labor entered into a contract with defendant for an institutional guarantee which was accepted by CMC. This is the precise wording of the contract. As it was never disputed (as, on the facts, in my view, it could not) that the joint venture should be treated as a partnership, the analysis proceeds upon this legal premise. It is possible for a partner to bind itself to a partnership creditor in such a way that a partner is individually liable **in solidium** to the creditor for payment of the whole of the partnership debt even during the subsidence of the partnership; see **Standard Bank of SA** v **Lombard** 1977(2) SA 808(T) at 813 G.

The facts of this case are of some relevance to my analysis. Plaintiff sued the defendants, jointly and severally, for provisional sentence on two written guarantees in which the defendants had bound themselves as sureties for the repayment on demand of all sums of moneys which the debtor, S.L. Investments, may "now or from time too time hereafter"

owe to the plaintiff The written guarantees further provided that the total amount to be recovered from the defendants under the guarantees would not exceed a sum stated in the guarantees together with interest and costs. It was further provided that the amount of the indebtedness of the debtor would be determined and proved by a certificate signed by any manager or accountant of the plaintiff and that such certificate would be conclusive proof of the amount of indebtedness under the guarantees and would be valid as a liquid document for the purpose of obtaining provisional sentence against the defendants. It appeared that the defendants were partners in S.L. Investments. Of relevance was the contention that, since a partnership was not a legal *persona* separate from the individual partners, the defendants as partners could not validly bind themselves as sureties for the partnership as they would in effect be standing as sureties for themselves.

Botha J (as he then was) held that the 'object sought to be achieved by means of the documents in question' was that each partner was individually bound (at 813 H).

Furthermore, in the event of the dissolution of a partnership, which would take place upon the liquidation of a partner, each partner would be liable for the partnership's debts. See in particular **Lawsa** vol. 19 at para 313.

In my view, the wording of the contract for an institutional guarantee concluded between Labor and the defendant is more than capable of a construction to the effect that the intention of such an agreement was to indemnify the particular obligations of Labor. No legal principle was raised by defendant which would run counter to this conclusion. One of the express purposes of the guarantee was to protect CMC in the event that Labor was liquidated or placed into judicial management. Given that this interpretation of the contract is both plausible and indeed reasonable, it is my view, that plaintiff was entitled to payment in terms of the guarantee.

It is important to emphasize that this case turned only on the question as to whether a contract for an institutional guarantee was concluded between Labor and defendant pursuant to the former's obligations in terms of contract WW38/99. The dispute did not concern misrepresentation or non disclosure which were not pleaded. To the extent that these issues were raised by defendant in argument, this reflects a conceptual confusion because, in defendant's pleadings, the question of non disclosure or information regarding SA Focus was never raised as a defence. The evidence of Ms Belchar would, in any event, undermine this line of argument.
For these reasons, plaintiff's claim succeeds and it is entitled to payment from defendant in the sum of R297 806.16 together with interest thereon at the rate of 15.5% per annum from 22 May 2002 to date of payment in full together with costs.

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DAVIS J