

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 11555/2008
DATE: 24 NOVEMBER 2008

5 In the matter between:

MIS MAINTENANCE CC t/a

N M CONSTRUCTION

and

Applicant

AFRICON INFRASTRUCTURE

10 PROJECTS (PTY) LTD

1st Respondent

ABSA BANK LIMITED

2nd Respondent

JUDGMENT

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GAUNTLETT, AJ

The applicant is a building contractor, the first respondent an
 20 employer in terms of a building contract between them and the
 second respondent a registered commercial bank which has
 furnished a guarantee to the first respondent in a sum of
 R2.498million.

This is the extended return day of an interim interdict granted on 18 July 2008 prohibiting second respondent from paying first respondent the guaranteed amount of R2,498 million. First respondent had called upon second respondent to pay it the full amount of the guarantee following an arbitration award in its favour.

The facts directly relevant to this ruling are few, and are common cause. The agreement incorporates a standard JBCC 2000 series principal building contract (Edition 4.1, March 2005). First respondent gave notice of cancellation of the main agreement on 2 April 2008, which applicant disputed. The dispute gave rise to an arbitral reference; the reference related only to the validity of the cancellation. The arbitrator in an award handed down on 16 June 2008 found the appellant's work to have been "appalling". His award was in these terms as regards the orders which he made:

- 20 "1. The cancellation of the contract was valid and lawful;
2. The defendant has no lien or any right of continuing possession of the site;

3. The defendant owes the claimant an amount of R621 300 in respect of the payment certificate number 3, issued on 17 March 2008;
4. The defendant shall be liable for interest on the outstanding amount calculated in accordance with clause 31.12 of the agreement, read with the “definition of interest.”
5. The parties are obliged to implement clause 36.5 of the agreement, pending the preparation of a record of costs and file an account.
6. The defendant shall pay the claimant’s party and party costs of suit on the High Court scale;
7. The claimant’s bill of costs shall be taxable by the Arbitration Forum.”

On 12 July 2008 first respondent called up the guarantee. On 18 July 2008, following fax service on first respondent the night before the hearing and with no service on the second respondent, an order was granted by Goliath, J calling upon the respondents to show cause on 14 August 2008 why an order should not be made interdicting the second respondent from making any payment in terms of the attached guarantee, and

"1.2 Dat voormelde dien as 'n tussentydse interdik hangende die finale beregting van 'n voorgenome hersieningsaansoek teen die arbitrasie toekenning van Advokaat Carstens, SC gedateer 18 Junie 2008 en/of 'n voorgenome aksie teen eerste respondent aanverwant aan die voormelde hersieningsaansoek (sic)

1.3 Dat indien voormelde voorgenome aansoek om aksie nie binne 30 dae na datum van hierdie bevel ingestel word nie, dat die regshulp soos omskryf in paragrawe 1.1 en 1.2 *ipso facto* sal verval.

....."

No review proceedings have been instituted. I was informed at the commencement of argument that applicant had formed the view that no viable review grounds could on analysis, be discerned. The alternative of an action to compel the applicant to comply with the quantification and certification exercise contemplated by paragraph 5 of the award (as I believe the second reference to "hersieningsaansoek" in paragraph 1.2 of the

order contemplates) has indeed been instituted (namely on 12 August 2008).

What arises for determination today is whether the *rule nisi* issued
5 on 18 July 2008, and already once extended, should be confirmed (as an order pending the final determination of the action instituted), or whether it should be discharged. In addition, together with its opposing affidavits first respondent has filed a cross-application, in terms of which it seeks an order making the
10 arbitral award an order of court.

Embedded in collateral skirmishing in this matter lie three issues which in my view go to its heart. The first issue is whether, as applicant contends, the construction guarantee must be construed
15 together with the agreement, and thus with reference to it. The second is whether, as applicant also contends, the guarantee (so construed) requires payment prior to quantification and certification of losses arising on cancellation. The third is whether in any event the effect of the award is to oblige, qua
20 award, first respondent to quantify and procure certification – in effect, first to prove its loss - before it may call on the guarantee.

Counsel for the applicant was invited to analyse the guarantee clause by clause. The effect of this exercise, he thereafter correctly conceded, is that the guarantee (perhaps unsurprisingly, given its nature and purpose) proclaims its autonomy. It seeks at every turn to make its execution not dependent upon the substantive and procedural requirements of the agreement. Thus clause 3.1 is inimical to the interpretation of the guarantee by reference to the agreement, and also emphasizes that the guarantee is not accessory in nature. Similarly clause 12, provides for the guarantee to serve as a liquid document, and thus underscores its functional autonomy. Clause 5 (as clauses 8 and 12 thereafter confirm) is an alternative to clause 4 thus while clause 4 provides for a certification process, clause 5 – and marked an obvious contrast – does not.

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In the present case, first respondent has clearly invoked clause 5 which provides for payment of the “guaranteed sum or the full outstanding balance” simply on provision of notice of cancellation.

I accordingly hold that the concession was correctly made, and that the guarantee is not to be interpreted by reference to the agreement.

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The second issue, as I have indicated, is whether the guarantee is capable of being read in terms such as to require prior quantification and certification before first respondent may call it up. Of course if the first postulate I have outlined fails, then properly speaking so should this. I would however add that it is striking that clause 14.4.5 of the JBCC standard contract itself provides that where an employer has a claim in terms of clause 33 – which the applicant suggested in its argument is the case here – “the employer may issue a written demand in terms of the fixed construction guarantee ...”.

The third issue is whether in any event the award requires first respondent to quantify and certify any claim before invoking the guarantee. This was ultimately the main focus of the argument for the applicant. I have to say at the outset in this regard that the jurisdiction of the arbitrator to make his orders in terms of paragraphs 2 to 5 of the award is not entirely clear to me. The arbitration agreement identifies the validity of the cancellation as the only dispute. It may be that an argument arises that the further provisions of the orders made by the arbitrator were by necessary implication authorised by the general terms of that reference. However it may be noted that in paragraph 23 of the award the arbitrator acknowledges that the matter dealt with in

prayer 2 was by express mention in the award not even pleaded. The applicant at the outset, on a question from me to its counsel, however withdrew its opposition to the award being made an order of court in terms of the cross-application as sought, and further
5 acknowledged (again correctly in my view) that this would of course carry in principle the costs of the cross-application. This stance makes it accordingly not necessary to consider that aspect any further, as the situation which has now arisen before me in relation to the cross application is that by consent of both parties
10 I am asked to make an order in terms of the award as an entirety, and there is no residual aspect of legal policy which militates against that happening.

What is clear in relation, then, to the residual issue of the effect
15 of paragraph 5 of the arbitral award on the matter is that the present issue – namely the enforceability of the construction guarantee – did not form part of the arbitration (to which, it may be noted, the second respondent was not even a party, as clearly it would have had to be). The orders in the award do not in their
20 terms state or necessarily imply that they are an exclusive enumeration of all rights and obligations of the parties arising on cancellation – least of all in the uncertain circumstances in which these orders appear to have been added by the arbitrator. Once

the first concession is made – that the guarantee stands alone, as a source of its rights, and certainly in relation to the interpretation of its terms – the suggestion that first respondent may not now invoke the guarantee by arbitral award without first quantifying and certifying is demonstrably fallacious. It represents an attempt without justification to read into the arbitral award an intention by the arbitrator to constrain the rights of the parties, in respects which not only *prima facie* appear to have been beyond the terms of reference, but which the award itself indicates is highly unlikely to have been his intention. (It may be noted that first respondent has in fact, on the papers, quantified claims exceeding R9million, with no attempt at factual rebuttal in reply by the applicant, other than its repeated assertion that, as a matter of law, prior certification is required. At its peril the applicant has either chosen or failed to address these pertinent allegation sin the opposing papers).

For these reasons, the *rule nisi* must be discharged. I hold in this respect that the applicant has not established a *prima facie* rate even on the Webster v Mitchell test.

Counsel for the first respondent seeks an attorney and client costs order. In relation to the principal application itself, there is

certainly conduct to be criticised: non-compliance, repetitively, with the rules, a wholly ill-founded central premise for the interim interdict, founded upon what was asserted to be an error, or a failure to apply the mind of the arbitrator, neither of which constitute a review ground under the Arbitration Act; the procuring of an interim order which does not requirements of Section 33(2) and 38 of the Arbitration Act; and other aspects which it is not necessary to deal with. Not without hesitation, however, I do not think it appropriate in my discretion in the circumstances of the matter to make a punitive order of costs in relation to what I have described is the main application.

As regards however the application for condonation, I hold a different view. It was made excusably late, it comprises essentially a farrago of legal argument; the court find itself has been left with partially unpaginated papers and which are generally in a slovenly state.

I believe the complexity of the issues and what was at issue in this matter make the engagement by first respondent of two counsel a reasonable step to have taken.

The order I accordingly make is as follows:

- 1) The *Rule Nisi* is discharged and the application is dismissed, including the costs of two counsel.
- 2) The cross application is upheld, with costs, including the costs of two counsel.
- 3) The application for condonation is dismissed with costs, including the costs of two counsel, on the scale between attorney and client.

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GAUNTLETT, AJ