



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

CASE NO: 2020/4130

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

DATE: 26 MAY 2021

In the matter between:

CAPE TOWN 4 PROPERTIES (PTY) LTD

Applicant

And

GUARDRISK INSURANCE COMPANY LIMITED

Respondent

JUDGMENT

ALLY AJ

INTRODUCTION

[1] This is an opposed application for the payment of the amount of R 1 920 849.61, being *mora* interest of 10.5% in terms of the Prescribed Rate of Interest Act, 1975, calculated on the amount of R 13 041 482.67 (hereinafter referred to as the "*the Guaranteed Sum*") from 23 August 2018 to 17 January 2020.

[2] Applicant alleges that on 13 September 2016, it entered into a Principal Building Agreement with TGP Building (Pty) Ltd (hereinafter referred to as "*TGP*") being a construction contractor, in terms of whereof the Applicant engaged TGP to construct a residential development of 310 flats in Observatory, Cape Town.

[3] Applicant alleges that on 8 February 2018, pursuant to the building agreement between the Applicant and TGP, TGP provided a performance guarantee¹ that had been issued by the Respondent under policy no. CG16/02680-02 in favour of the Applicant.

[4] According to Applicant, on 16 August 2018, it notified the Respondent that it was calling up the Guarantee in terms of clause 5.0 and 5.1 thereof.

[5] Applicant alleges that despite lawful demand, the Respondent failed and/or refused to pay the Guaranteed Sum within 7 (seven) days and only paid the amount of R 13 041 482.67 to the Applicant on 17 January 2019.

¹ Caselines: 001 - 053

[6] Applicant submits that the amount of R 1 920 849.61 being claimed by the Applicant constitutes *mora* interest that is due and payable to the Applicant (calculated from 23 August 2018 to 17 January 2020 on at 10.5% on R 13 041 482.67), resultant from the Respondent's failure and/or refusal to pay the Guaranteed Sum to the Applicant within 7 (seven) days of lawful demand.

[7] The Respondent contends that it was prevented from paying the Guaranteed Sum before 15 January 2019, due to the legal proceedings brought by TGP prior to the seven days mentioned above expiring. (Payment was made on 17 January 2019; the Respondent has tendered payment for the *mora* interest from 15 January 2019 to 17 January 2019).

[8] The Respondent contends further that it is not liable to pay *mora* interest due to the maximum liability clause contained in the Guarantee.

EVALUATION AND ANALYSIS

[9] This application brings to the fore the issue of performance guarantees. However, this application raises the issue of whether on demand, an insurance company can refuse to pay only for the reason that an application interdicting them from paying has been launched. Basically this is the crux of this case.

[10] The Courts have expressed themselves on 'performance guarantees' and their nature and effect. I align myself with the sentiments expressed in those

cases.² In my view the Applicant complied with the terms of the performance guarantee and in the circumstances expected to be paid following the expiry of the 7 (seven) days.

[11] Our Courts have, however, mentioned that payment may be refused where there is a fraud perpetrated to the knowledge of the 'finance institution'.

[12] The Respondent in this matter has not raised the 'fraud exception' but raised in argument, the public policy defence in terms of which if Respondent had paid before the interdict proceedings were finalised, it would be contemptuous and against public policy.

[13] In my view, nothing stops a person in the shoes of the Respondent from taking a course as was taken by them in this matter, namely, by not paying the amount claimed on demand. However, the Respondent must then face the consequences of that course of action.

[14] I also align myself with the sentiments of Theron JA, as she then was:³

"In my view this principle is based on sound reason. It underscores the commercial nature of performance guarantees. In determining whether payment should be made on such a guarantee, accessory obligations are of no consequence. The very

² Dormell Properties 282 CC v Renasa Insurance Co Ltd & Ano 2011 (1) SA 70 (SCA) @ para 61 et seq

Lombard Ins Co Ltd v Landmark Holdings (Pty) Ltd 2010 (2) SA 86 (SCA) @ para 20

Edward Owen v Barclays Bank International 1978 (1) All ER 976 (CA) @ 983 b-d

First Rand Bank v Brera 2013 SCA 25 @ para 2

State Bank of India v Denel SOC Ltd 2014 SA 212 (SCA) @ para 8-9

³ Guardrisk Insurance Co Ltd & Others v Kentz 2013 SCA 182 @ para 29

purpose of the guarantee is so that the beneficiary can call up the guarantee without having to wait for the final determination of its rights in terms of accessory obligations. To find otherwise, would involve an unjustified paradigm shift and defeat the commercial purpose of performance guarantees.”

[15] Whilst our Courts are jealous of the jurisdiction to adjudicate matters unless good grounds exist for an ouster, it is my view that the intervening issue of an interdict application, does not avail the Respondent in this case, in the sense that, it must face the consequences as stated above and that consequence is that they must pay *mora* interest to the Applicant for the reason that they did not pay within the timeframe demanded.

[16] Respondent's Counsel enjoined the Court to consider the issue of the competence of the Court to adjudicate applications and actions lodged with it. In this regard, so the argument went, it would be contemptuous of a litigant to decide on its own before allowing the Court to make a decision.

[17] Furthermore, the Respondent contended that non-payment was not the legal cause of the damages suffered by the Applicant but that it was the actions of TGP by instituting interdict proceedings that caused such damages.

[18] The third contention on behalf of the Respondent was the public policy issue which has been dealt with above.

[19] With regard to the argument by the Respondent relating to its possible constructive contemptuous conduct in paying prior to adjudication by the Court, I am of the view that there is no substance in the argument. I am in agreement with Counsel for the Applicant that, firstly, Respondent's conduct paying the amount in January 2020 before Part B of the interdict proceedings having been pronounced upon, belies their defence. In other words, are they not in contempt of court, on their argument, by paying the amount, demanded, in January 2020, before a Court pronounced itself? This clear contradiction works against the Respondent.

[20] In my view, the paying of the amount demanded, would not amount to an intention to defeat the course of justice by taking away the Court's competence of the Court as expressed in **Gauteng Gambling Board & Another v MEC for Economic Development, Gauteng Provincial Government**.⁴

[21] I further agree with the submission by Applicant's Counsel that the Respondent did not make out a case on the papers that they knew or reasonably believed that the interim order would be granted by the Court which is one of the requirements set out in the Gauteng Gambling Board case and **City of Tshwane Metropolitan Municipality v Afriforum**.⁵

[22] I turn now to the causation argument raised by the Respondent. As I understand this submission, it states that the non-payment by the Respondent of the amount demanded in terms of the 'performance guarantee' was not the cause of any damages suffered by the Applicant but that the application proceedings

⁴ 2013 (5) SA 24 (SCA)

⁵ 2016 (6) SA 279 (CC)

launched by the TGP resulted in Respondent not paying within the timeframe mentioned in the demand letter. I am satisfied that the non-payment of the amount as demanded is the *causa causans* of the Applicant not being placed in a position it would have been had the amount been paid on time and therefore entitles it to *mora* interest as described in **Land Agricultural Development Bank of South Africa v Reyton Estates (Pty) Ltd & Others**⁶ where it was stated:

“Mora interest, on the other hand, is something fundamentally different. It is not payable in terms of an agreement, but constitutes compensation for loss or damage resulting from a breach of contract, specifically mora debitoris.”

[23] The Respondent as part of their submission argued that if they were liable for *mora* interest such *mora* interest must be calculated from 15 January 2020 – 17 January 2020.

[24] In my view the liability for *mora* interest arises from the date of expiry of the 7 (seven) days given to the Respondent to pay and in the amount as claimed by the Applicant in accordance and alignment with the view expressed above regarding placing the Applicant in the same position it would have been had the amount been paid on time.

COSTS

[25] There is no need to deviate from the norm that costs should follow the result and none was argued. Therefore, in my view, the Respondent is liable for the costs of the Applicant.

⁶ 2013 (6) SA 319 (SCA)
Bellairs v Hodnett 1978 (1) SA 1109 (A) @1145 D-G and 1146H – 1147A

[25] There is no need to deviate from the norm that costs should follow the result and none was argued. Therefore, in my view, the Respondent is liable for the costs of the Applicant.

[26] Accordingly the Applicant is entitled to the relief claimed in the Notice of Motion with costs.

In the result the following Order shall issue:

- 1) The Respondent shall pay the amount of R1, 920, 849, 61 to the Applicant;
- 2) The Respondent shall pay interest on the aforesaid amount calculated at 9.75% *a tempore morae*;
- 3) Respondent to pay the costs of this application



ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 May 2021.

Date of hearing: 10 September 2020

Date of judgment: 26 May 2021

Appearances:

Applicant : **Mr T N Hamman**
Du Toit Sanchez Moodley Inc
Stonemill Office Park, Ground Floor
Kiepersol House No 2
300 Acacia Road
Randburg
jaco@hahnlaw.co.za
merilynn@hahnlaw.co.za

Respondent : **Adv. A. Lamplough**
ENSAFRICA
The MARC, Tower 1
129 Rivonia Road
Sandton
rscott@ENSafrica.com
zsher@ENSafrica.com