


REPUBLIC OF SOUTH AFRICA



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

Case Numbers: **51107/2021**

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|------------|---|
| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED: YES/NO |
| | |
| 20/11/2024 |  |
| DATE | SIGNATURE |

**REDPATH MINING (SOUTH AFRICA)
(PTY) LTD**

Applicant

and

**SIYAKHULA SONKE EMPOWERMENT
CORPORATION (PTY) LTD
FREDERICK SAM ARENDSE
REDPATH AFRICA LTD**

First Respondent

Second Respondent

Third Respondent

In re:

**SIYAKHULA SONKE EMPOWERMENT
CORPORATION (PTY) LTD**

First Applicant

FREDERICK SAM ARENDSE

Second Applicant

and

REDPATH MINING (SOUTH AFRICA) (PTY) LTD

First Defendant

REDPATH AFRICA LIMITED

Second Defendant

JUDGMENT

SENYATSI J

Introduction

- [1] This is an application in terms of Rule 47(4), for dismissal of the respondents' main action. The application was initiated during September 2024, on the grounds that security for costs has not been provided as ordered by Court during May 2024 the amount of which was determined by the Registrar of this Court on 20 August 2024. The guarantee had to be provided within 15 days of the determination by the Registrar. The application is opposed by the respondents *albeit* with the late filing of the answering papers on the basis that a R2 million bank guarantee has been secured from Investec Bank on 12 November 2024.
- [2] The respondents also contend that as the guarantee may fail to comply fully with the determination of the Registrar and that such shortfall can be addressed by varying the order granted by this court relating to the provision of security. They contend furthermore that they be granted an opportunity to address the shortcomings that may be found by this court to be present in the guarantee.
- [3] The Registrar directed the respondents to provide security to the applicant in the amount of R2 million in a form agreed upon between the parties and

if the parties could not agree on the form of security to be furnished, then an irrevocable South African Commercial banker's guarantee had to be provided.

- [4] The parties engaged one another regarding the form of security as determined by the registrar and did not agree on the form. The respondents were placed on terms to provide the bank guarantee. Accordingly, the irrevocable bank guarantee issued by a South African Commercial bank had to be secured.
- [5] Upon realising that the bank guarantee was not forthcoming, the applicant issued and supplemented its papers for the dismissal of the action on 11 September 2024. Although the respondents filed notice to oppose the application for dismissal, this was not followed by an opposing affidavit as required by the Rules of this court. In fact, the opposing affidavit was filed on 15 November 2024, a mere court day before the hearing of this application and the late filing of the opposition to the application to dismiss was not followed by the condonation application.
- [6] On the day of the hearing, an application for my recusal was argued. The application had been uploaded on Sunday, 17 November 2024 and the recusal application was made in respect of both the dismissal of the action application and the deemed offer application the latter of which was to be heard on 20 November 2024 . After the parties' s counsel made submissions for and against the recusal.
- [7] The main basis of the recusal application was the directive I had given when the respondents sought the matter to be postponed due to the alleged unavailability of their counsel on 18 November 2024 in which directive I indicated my *prima facie* view that the revocable bank guarantee was not

in accordance with the determination by the Registrar of this court as security for costs to be provided to the applicant. I disagreed that I had prejudged the matter as contented by the applicants in the recusal application. I determined that I was not biased against the applicants and dismissed the application for my recusal with costs.

- [8] From the time the supplementary papers were launched for the dismissal of the application; the filing of the Practice Note by the applicant and the eventual securing of what the applicant disputes as irrevocable guarantee, various correspondences were being exchanged between the parties' legal representatives. My office was inundated with correspondence from the respondents' attorneys, CDH firstly, with the request to postpone the application to March 2025. The reason for the postponement request was that the senior counsel briefed by the respondents was unavailable and later I was informed that he was relocating. Secondly, I was informed through a letter that the bank guarantee of R2 million had been secured and that the matter had become moot and that the dismissal of action application had to be removed from the roll.
- [9] The applicants disputed that the bank guarantee which had only been secured on 14 November 2024 was compliant with the determination by the registrar of the court which required the bank guarantee to be irrevocable. I directed that the matter should proceed on 18 November 2025 as scheduled. It should be borne in mind that the respondents had not filed an opposing affidavit up to the time I directed that the matter would proceed on 18 November 2024. What had been filed and uploaded by the respondents, as already mentioned, was notice to oppose the dismissal of the action and this was done on 26 September 2024.
- [10] The respondents filed their answering affidavit on 15 November 2024 which was out of time. The answering affidavit was not accompanied by

an application for condonation of the late filing thereof. However, I will consider the Bank Guarantee from Investec Bank attached thereto.

[11] I shall only refer to the controversial provisions of Investec Bank's disputed guarantee and these are clauses 7 and 8 thereof. Clause 7 provides thus: -

"Notwithstanding anything to the contrary contained herein, the Bank reserves the right to withdraw from this Guarantee by giving the Beneficiary 1(one) month's written notice calculated from the date of the notice of the Bank's intention to do so and any claim which arises or demands for payment which is received after the aforesaid withdrawal shall be invalid and unenforceable provided that the Bank shall remain liable in respect of any demand for payment which is received during the aforesaid notice period." Clause 8 states that: -

"This Guarantee shall expire at the earlier of:

8.1 12h00, 5 years from the date of issue;

8.2 upon payment made by the Bank to the First Defendant in terms of this Guarantee;

8.3 upon payment made by the Bank to the First Defendant in terms of a court order;

8.4 upon payment made by the Bank to the First Defendant in terms of any determination made by the Registrar; or

8.5 upon the agreement between the First Defendant and the Plaintiff that this Guarantee has expired prior to the 9.1 above, ("**the Expiry Date**"). After the Expiry Date this Guarantee shall be null and void, whether returned to the Bank for cancellation or not and any claim which arises or demand for payment received after the Expiry Date shall be invalid and unenforceable."

[12] With those provisions in mind, the controversy is whether the Bank Guarantee from Investec Bank is irrevocable as determined by the Registrar.

[13] Mr Smit on behalf of the respondent submitted that although on the face of it, it was revokable, that I should adopt a businesslike interpretation to give effect to the true intention of the Bank Guarantee, namely, to serve as security for costs as ordered by court. He furthermore implored to me that to the extent I hold the view that it is not irrevocable as determined by the Registrar, that I should exercise my discretion to give the respondent an opportunity to cure the Bank Guarantee within 10 days of the order I make. For reasons that will become clear in this judgment, I do not agree with the two propositions.

[14] It is important at this to restate the legal principles applicable to guarantees. The system of bank guarantees and referred to as a letter of credit, has been a feature of trade both locally and internally. In *Loomcraft Fabrics CC v Nedbank Ltd and Another*¹, Scott AJA said the following about the nature of irrevocable letter of credit(guarantee) by the bank: -

“The system of irrevocable documentary credits is widely used for international trade both in this country and abroad. Its essential feature is the establishment of a contractual obligation on the part of a bank to pay the beneficiary under the credit (the seller) which is wholly independent of the underlying contract of sale between the buyer and the seller and which assures the seller of payment of the purchase price before he parts with the goods forming the subject matter of the sale. The unique value of a documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank 's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or for that matter

¹ [1995] ZASCA 127; 1996 (1) SA 812 (SCA); [1996] 1 All SA 51 (A); [1996] 1 All SA 51 (A) (17 November 1995) para 5.

even the existence of the underlying contract, by issuing or confirming the credit, the bank undertakes to pay the beneficiary provided only that the conditions specified in the credit are met.”

- [15] It is clear from the passage quoted that the guarantee is independent of the underlying contract, and it creates the relationship between the bank and the beneficiary. The guarantee can be structured in any manner and the bank is obliged to honour its payment obligations once the conditions set out in the guarantee are met by the beneficiary. Bank guarantees are also commonly used in immovable property sale transactions in terms of which the purchaser will instruct the bank, usually the lender in the transaction, to issue a guarantee of the balance of purchase price which guarantee will usually be presented for payment on registration of the property. Bank guarantees are also used in civil litigation, as in this case, if one of the parties involved is of the view that his or her adversary will not be able to meet the cost order if he or she is successful in the litigation. Rule 47 of the Uniform Rules of Court sets out the steps to be taken when a demand for security for costs is made. The quantum of the security for costs is, as in this case, determined by the Registrar.

- [16] Rule 47(4) states that: -

“The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.” Rule 47(4) reflects the previously existing² inherent jurisdiction that the High Court had to dismiss proceedings when a party ordered to put up security, fails to

² *Excelsior Meubels Beperk v Trans Unie Ontwikkelings Korporasie Beperk* 1957 (1) SA 74 (T) 76D.

comply with the order.³ The power to dismiss proceedings must be exercised sparingly and with circumspection⁴. Rule 47A provides for exclusion of being required to furnish security for costs by an indigent who is being assisted in the litigation through legal aid.

- [17] The nature and the form of the bank guarantee is dependent on its terms and can either be conditional (revocable) or unconditional(irrevocable).⁵
- [18] I now turn to consider whether Clauses 7 and 8 of the Investec Bank Guarantee accord with the determination made by the Registrar that failing the agreement between the parties, the first respondent must provide an irrevocable guarantee for R2 million issued by a South African Commercial bank. There is no doubt that on the face of it, the guarantee issued by Investec Bank is not irrevocable. This is so because the guarantee may be revoked at any time before its term of 5 years by giving the beneficiary 30 days' notice within which the beneficiary may demand payment. This scenario will lead to undesirable consequences because firstly, it is not known when the litigation will be concluded and secondly, if it is in favour of the beneficiary, how long it will take to tax the bill of costs which may or may not be debated. More importantly the required irrevocable guarantee to provide for security of costs cannot be lodged before litigation is concluded and is in favour of the beneficiary. The same

³Cilliers AC, Loots C and Nel HC Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th ed, 2009 ch13-p4185th ed, 2009 ch13-p 418, *Selero (Pty) Ltd v Chauvier* 1982 (3) SA 519 (T) 522A–C. See also Van Loggerenberg DE and Bertelsmann E Erasmus: Superior Court Practice RS 20, 2022, D1-633.

⁴ *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 271, *Kuiper and Others v Benson* 1984 (1) SA 474 (W) 477A, *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W), *Sanford v Haley* NO 2004 (3) SA 296 (C) par. 8.

⁵ See *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd* [2013] ZASCA 182; [2014] 1 All SA 307 (SCA) para 14.

goes for Clause 8 which provides that the guarantee is for a fixed term of 5 years.


- [19] In any event, it is clear from the papers, especially the communication from Investec Bank that they are willing to issue an irrevocable guarantee which is backed by cash equivalent to R2 million. It should be remembered that during the submission in the application for security, the first respondent had informed me under oath that it was flush with investments worth R52 million and that it was not necessary for it to be ordered to furnish the security for costs to the applicant.
- [20] Regard being had to the requirement from Investec Bank that they are willing to issue an irrevocable guarantee which is backed by cash, I have no doubt that the first respondent does not have the investments worth R52 million as it had claimed because if this was the case, the cash equivalent of R2 million would have been made easily available to Investec Bank to enable it to issue the irrevocable guarantee in favour of the applicant.
- [21] The first respondent has therefore in my view, not only failed to secure an irrevocable bank guarantee, but failed to furnish it within 15 days after the determination by the Registrar. I have not been provided with any authority by Mr Smit for the first respondent on the proposition that in the exercise of the court's discretion, I should give the first respondent more time to secure the bank guarantee that is compliant with the determination by the Registrar. As this is a concession that indeed the bank guarantee with the revocation clause and limited to a term is not compliant with the determination by the Registrar, there is no basis for me to grant the extension as prayed for by Mr Smit in his oral submissions.

[22] Accordingly, the pending action case under case number: 51107/2021 stands to be dismissed.

Order

[23] Having considered the papers and the submissions made on behalf of the parties, the following order is made: -

- (a) The pending action under case number 51107/2021 is dismissed for failure to provide security for costs in accordance with the determination by this court the amount of which was determined by the Registrar on 20 August 2024;
- (b) The first respondent is ordered to pay the costs of the application including counsel's fees.



ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **20 November 2024**.

Appearances:

For the Applicant: Adv D Watson

Adv Z Ngakane

Instructed by Kampel Kaufmann Attorneys

For the respondent: Adv M Smit

Adv T Poee

Instructed by Cliffe Dekker Hofmeyer Inc

Date judgment reserved: 18 November 2024

Date of Judgment: 20 November 2024

