IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE 29/11/2012 SIGNATURE

CASE NO: 41976/2011

DATE: 29 November 2012

IN THE MATTER BETWEEN

PROCPROPS 60 (Pty) Ltd Plaintiff

and

NEDBANK LIMITED Defendant

and

TOP CD (MENLYN) (PTY) LTD Third Party

JUDGMENT

LEDWABA J:

[1] The plaintiff (Procprops) issued summons against the defendant (Nedbank) for payment of R241 151,87 alternatively R145 387,32 in terms of a guarantee issued by Nedbank in favour of Procprops.

[2] Nedbank joined its customer Top CD (Menlyn) (Pty) Ltd (Top CD), at whose request the guarantee was issued, as a third party to the proceedings.

[3] The summary of the background facts which are common cause between the parties are the following:

3.1 On or about 1 July 2009 Top CD and Procprops entered into a written lease agreement which agreement has been attached to the particulars of claim as 'annexure A'.

3.2 Nedbank issued a letter of guarantee number 497/29911400 dated 27 September 2009 for R313 845,53 (three hundred and thirteen thousand eight hundred and forty five rand and fifty three sent) on behalf of Top CD in favour of Procprops, see 'annexure B' to the particulars of claim. The contents of the guarantee will be referred to and discussed later in this judgment.

3.3 Top CD vacated the leased premises on 26 December 2010, after the negotiations to cancel the lease failed and it did not make further payments in respect of the rental from January 2011.

3.4 On 13 January 2011 Procprops's previous attorneys, Van Der Merwe Du Toit Inc delivered a letter of demand by hand at Nedbanks address set out in the guarantee demanding payment of R72 693,66 (seventy two thousand six hundred and ninety three rand and sixty six sent) because of Top CD's failure to pay Procprops rent for January 2011, see 'annexure C' to the particulars of claim. The last paragraph in the said letter of demand reads as follows:

> *" Could you also please consider the fact that this letter calls upon you to perform only partially in terms of the guarantee and accordingly our client's rights in respect thereof are not extinguished. Could you please in view thereof return the original guarantee to us to enable our client to call on the guarantee should it become necessary in future."*(Own underlying)

3.5 Nedbank paid the amount claimed on 21 January 2011.

3.6 Procprops again through its previous attorneys addressed other letters of demand to Nedbank on 7 February 2011, 14 February 2011, 21 February 2011 and 1 March 2011 demanding the rentals for February and March.

3.7 Nedbank only responded on 14 March 2011 via an e-mail as follows:

"Please note that Nedbank did perform in terms of the guarantee in favour of your client, when we received your first written demand dated 13 January 2011. accepted return of the original guarantee and duly paid the amount demanded. The guarantee has been cancelled and we are of the opinion that all obligations in term thereof have been extinguished."

3.8 The guarantee was not returned to Procprops.

3.9 Procprops through its attorneys of record in May 2011 addressed a letter of demand to 'The Manager of Nedbank Corporate, P .O Box 455 Pretoria and faxed it to the number '0866088268' demanding payment of the balance outstanding of R241 151,87 (two hundred and forty one hundred and fifty one rand and eighty seven sent) in terms of the guarantee.

3.10 Nedbank did not comply with the demand and Procprops issued summons in July 2011.

[4] Nedbank in its plea raised the following defences:

"4.1 That upon a proper construction of the terms of the guarantee. further alternatively a tacit, alternatively implied term of the guarantee, that the guarantee would lapse, and or Defendant's obligations thereunder discharged upon payment of the amount guaranteed, or any lesser portion thereof.

4.2 That upon payment by the Defendant of the amount of R72 693,66 on 21 January 2011, the guarantee lapsed and/ or the defendant's obligations thereunder.

4.3 That demands, marked annexure "D" and the demand of 1 March 2011 do not comply with the express terms of the guarantee, namely that it shall inter alia be accompanied by the original guarantee."

[5] Only one witness Mr Christodoulou testified on behalf of Procprops. The plaintiff thereafter closed its case. Nedbank and Top CD closed their cases without calling any witnesses.

[6] I think it is not necessary to summarize the evidence of the plaintiff's witness because it is clear that the issue to be determined is based on the interpretation of the contents of the guarantee in particular clause 4 thereof which reads as follows:

"Payment shall be made upon receipt by the bank, at its address stated in clause 3 above, of the landlord's first written demand, which written demand shall be accompanied by this original guarantee and which will state that the lessee has failed to comply with its obligations in respect of the lease and that, accordingly, the amount of ***R313845,53 (THREE HUNDRED AND THIRTEEN THOUSAND EIGHT HUNDRED AND FORTY FIVE RAND, FIFTY THREE CENTS),*** *or any lesser portion thereof, is now due and payable. In the event that the branch mentioned in clause 3 above closes for whatsoever reason, this guarantee may be presented at any other branch of the bank."*

[7] The defendant in its plea pleaded , *inter alia*, as follows:

"7.1...It was further material term of the guarantee that it be returned to the defendant upon payment or expiry;

7.2 The defendant pleads that upon a proper construction of the terms of the guarantee...that it would lapse, and/or defendant's obligations thereunder discharged upon payment by the defendant of the amount guaranteed, or any lesser portion thereof.

7.3 The defendant admits the subsequent demands marked "D" and the demand of 1 March 2011 and its failure to return the guarantee, but denies it was obliged to return same or make payment of the amount demanded.

7.4 The defendant avers that, upon payment by the defendant of the amount of R72 693,66 on 21 January 2011 the guarantee lapsed and/or the defendant's obligations thereunder were discharged, in terms of the guarantee.

7.5 The demands, marked "D", and the demand of 11 March 2011 do not comply with the express terms of the guarantee, namely that it shall inter alia be accompanied by the original guarantee.

7.6 In the premises, the defendant denies that it ws liable, whether under the demands referred to herein, or at all.

7.7 These allegations are denied. Without derogating from the generality of the aforegoing denial, the defendant denies that it is liable under the guarantee for want of compliance under its express terms, in particular that a demand made thereunder shall be accompanied by the original guarantee."

[8] The issues that have been raised by Nedbank and Top CD relate to:

i. The interpretation of the guarantee;

ii. Whether proper demand has been made to comply with the terms and conditions of the guarantee;

iii. Whether the demand was proper, even if it was not accompanied by the original guarantee.

[9] Advocate Girdwood and Advocate Oosthuizen representing Nedbank and Top CD, respectively, submitted that the words "*first written demand*", in clause 4 of the guarantee are very clear and not ambiguous. They further submitted that in the guarantee there is no obligation on Nedbank to return the guarantee after making

part payment of the full guarantee amount. Advocate Oosthuizen argued that the word 'first' emphasizes the fact that Nedbank can only be obliged to comply only once with its obligation in terms of the guarantee otherwise the word first would not have been used.

[10] Advocate Gibbs, representing Procprops submitted that the wording of paragraph 4 of the guarantee is ambiguous insofar as the phrase "landlords first written demand" is concern. The phrase could mean that payment would be effected immediately on the first written demand and that it would not be necessary for the landlord (Procprops) to make more that one demand to obtain payment, but that it may make as many demands as is necessary.

[11] After careful perusal of clause 4 of the guarantee I think that the first part of clause 4 *viz "payment shall be made upon receipt by the bank,... of the landlords first written demand"* and *"first written demand"* is ambiguous.

[12] For the proper understanding of the terms of the guarantee the clauses should not be read in isolation but all the contents of the guarantee should be considered. Interpretation was a matter of law and not fact and accordingly interpretation was a matter for the court and not witness, see *KPMG Charted Accountants (SA) v Securefin Ltd 2009 (4) SA 399 (SCA).*In Cooper and Lybrand and Others v Brynt 1995 (3) SA 761 AD at page 767 paragraph E-F the court said: *"According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this or some repugnance or inconsistency with the rest of the instrument."*

[13] I should hasten to mention that in the guarantee *in casu* to interpret same it should not be looked at as a contract between Procprops and Nedbank. It was issued on instructions of Top CD which instructed Nedbank to issue it to comply with the terms of the lease agreement. Clause 49.1 of the lease agreement triggered Top CD to seek the guarantee and it reads as follows:

> *"The tenant shall furnish to the landlord a Bank Guarantee to the amount equal to 2 (TWO) month's rental, to which VAT must be added, and any other costs e.g. operating costs, parking, marketing fund, security and standby generator, if*

applicable. in the last month of the lease period set out herein (being year 10). which will be retained by the landlord during the currency of this Agreement of Lease, as a deposit and guarantee for prompt payment by the tenant of all amounts that are payable by the tenant for any cause whatsoever in terms of this Lease. No personal surety required. The Bank Guarantee is to be provided to the Landlord by not later than 60(sixty) days after signing of this lease agreement."

[14] Advocate Girdwood to support his submission that the bank had to pay only once referred the court to the word 'payment' and NOT 'payments' in clause 4 and 5 of the guarantee. However, one must also have regard to clause 9 which reads as follows:

"The banks obligations under this guarantee shall be restricted to the payment of money only."

This means that the bank has obligations NOT obligation to pay money. This is contrary to the interpretation that the bank had to pay only once.

[15] The guarantee is for R313 845,53(three hundred and thirteen thousand eight hundred and forty five rand and fifty three sent). The terms and conditions in the guarantee are there to prescribe the procedure before the bank can pay the maximum amount of R313 845,53(three hundred and thirteen thousand eight hundred and forty five rand and fifty three sent). For the guarantee to lapse after only about 25% of the guaranteed amount has been paid is absurd and inconsistent with the document. If the bank on instruction of its client intends to pay only once even if a lesser amount is claimed, I think the guarantee would have clearly reflected same.

[16] It is common *cause* that the letter of demand dated 16 May 2011 was not addressed to the address in clause 3 and that the original guarantee was not attached.

[17] Advocate Girdwood submitted that Procprops should strictly comply with the terms and conditions of the guarantee before the bank can be compelled to pay. He

supported his case by referring me to Compass Insurance Co Ltd v Hospitality Hotel Development (Pty) Ltd 2012 SA 537 (SCA) (Compass Insurance case).

[18] I carefully read the Compass Insurance case. The court did not finally decide on whether there should be strict compliance or not with the terms of the guarantee.

[19] *In casu* the guarantee states that the bank should receive the letter of demand at its physical address mentioned in clause 3. The letter of demand was addressed to the Postal Office box number reflected on the letter of Nedbank which noted the guarantee. I am not sure about the correctness of the fax number but Nedbank acknowledged receipt of the demand dated 16 May 2011.

[20] The other issue raised is that there was no proper demand, because the original guarantee was not attached to the demand. The issue of non attachment of the guarantee was not raised in the e-mail from Nedbank addressed to Procprops dated 14 March 2011.

[21] Nedbank stated that it *'accepted return of the original guarantee'*. However, it decided not to deal with what Procprops stated in its first letter of demand dated 13 January 2011 that the letter clearly stated that Nedbank was called upon to perform only partially in terms of the guarantee and that Procprops rights were not extinguished. Procprops further requested the return of the original guarantee.

[22] Nedbank did not object or comment on the 'condition' in the letter that the demand was for partial performance. Procrops clearly wanted the original guarantee to be returned, however Nedbank responded as if Procprops was returning the guarantee with no strings attached.

[23] I think Procprops accepted payment on the basis that there is no objection to the contents of the last paragraph of its first letter of demand dated 13 January 2011.

[24] In my view, it is opportunistic to pay and consider the rights of Procprops extinguishing without challenging what Procprops stated in the first letter of demand. If Procprops was informed how Nedbank interpreted clause 3 of the guarantee, maybe it could have considered its first demand and not pursue the demand. Be that as it may, it is my considered view that considering the context of the guarantee the

strict interpretation of reading the words 'first written demand' to extinguishes other obligations is repugnant with the guarantee.

[25] The guarantee clearly states that the demand shall be accompanied by the original guarantee. However, *in casu* it was impossible for Procprops to attach the original guarantee because same is in possession of Nedbank. There is definetly no prejudice to Nedbank because the document is in its possession.

[26] In the *Compass Insurance case*, Compass Insurance issued a guarantee to Hospitality Hotel for work undertaken by a subcontractor. The expiry date was 30 April 2008. The subcontractor was provisionally wound up on 23 April 2008. On 25 April 2008 a letter of demand was sent for the guaranteed amount. Compass Insurance refused to pay on the basis that the demand did not comply with the terms of the guarantee which state that a copy of the court order was to be enclosed or attached. The court order was delivered months after the expiry of the guarantee.

[27] The subcontractor was provisionally liquidated prior to the issue of the letter of demand. In paragraph 13 of the *Compass Insurance case* the court said the following:

> *"In my view, it is not necessary to decide whether 'strict compliance' is necessary for performance guarantees, since in this case the requirements to be met by Hospitality Hotel in making demand were absolutely clear, and there was in fact no compliance, let alone strict compliance. The guarantee expressly required that the order of liquidation be attached to the demand. It was not."*

[28] In paragraph 14 the court further said: "*it is the terms of the guarantee itself that will determine its nature. The guarantee in this case is an independent contract that must be fulfilled on its terms. There is no justification for departure and indeed allowing the furnishing of the copy of the court order months after the guarantee had expired would have defeated its very purpose.*"

[29] *In casu* the guarantee states the address where the letter of demand is to be sent and what should accompany it. In my view, the terms and conditions are to assist the guarantor should there be an issue whether the letter was received or not.

Nedbank admitted to have received the letter I think strict compliance is therefore not necessary.

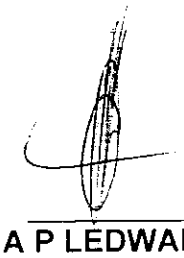
[30] The attachment of the guarantee is to assist the guarantor to verify the terms of the guarantee and to check whether there is no fraud. Obviously Procprops could not attach the guarantee to the letter because the original was with Nedbank. In annexure "D" the number of the guarantee is mentioned. Nedbank is specifically informed that the original guarantee has been forwarded to them.

[31] When Nedbank was informed about the letters of the 7th of February and the 1st of March it managed to retrieve or trace the letters. I see no reason why it could not retrieve the original guarantee in May 2011 when it received annexure "D. Strict compliance, in my view, would not be necessary because the document is in their possession.

[32] Importantly, in the Compass Insurance case the court also considered that the guarantee has expired. *In casu* the guarantee would expire in April 2020. In Compass Insurance the meaning of 'first written demand' was not raised as an issue.

[33] I therefore make the following order:

1. **The defendant (Nedbank) is ordered to pay the plaintiff the sum of R241 151,87 plus interest thereof at the rate of 15.5% per annum from May 2011.**
2. **The defendant and the third party are jointly and severally ordered to pay the plaintiff's costs.**



A P LEDWABA
JUDGE OF THE HIGH COURT

HEARD ON: 22 November 2012

FOR THE PLAINTIFF: Adv W W Gibbs

INSTRUCTED BY: Gross Papadopulo & Associates, Pretoria

FOR THE FIRST DEFENDANT: Adv G W Girdwood

INSTRUCTED BY: Cliffe Dekker Hofmeyer Inc, Pretoria

FOR THE THIRD PARTY: Adv H F Oosthuizen

INSTRUCTED BY: Eloff Brink Attorneys, Pretoria