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The Law on Guarantees revisited and confirmed

18 July 2024 *5 min read*

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Bonifacio and Another V Lombard Insurance Company Limited Case No.: 247/2023

The nature of guarantees has once again been dealt with decisively by the Supreme Court of Appeal (**SCA**) this time in the matter between Bonifacio and another v Lombard ("***Bonifacio***").

A guarantee is an obligation to make payment upon the occurrence of an event. The court in *Bonifacio* reiterated the position held in *Loomcraft Fabrics CC v Nedbank Ltd and another* [1996] 1 All SA 51 (A) and confirmed in Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd [2009] 4 All SA 322 (SCA) that the nature of this obligation is "*wholly independent of any underlying contract*".[1] The court dealt with issues of guarantee, indemnity, the dependency of the liability and the effect of fraud.

Facts

In 2009, DBT Technologies (Pty) Ltd ("***DBT***") was subcontracted to perform work at Eskom's Kusile Power Plant. DBT in turn subcontracted some of this work to Tubular Construction Projects (Pty) Ltd ("**TCP**"). As security for its performance obligations to DBT, TCP provided an on-demand performance guarantee in favour of DBT. This guarantee was issued by Lombard Insurance Company Limited ("**Lombard**"), the respondent in the *Bonifacio* for an amount of R128 375 851.20 and was payable to DBT on written demand in the event of a breach of the subcontract by TCP ("**the guarantee**").

In 2019 the appellants indemnified Lombard for all liability and expenses whatsoever in terms of the guarantee, and in their turn agreed to pay, on demand, any sum of money which Lombard may be called upon to pay under the guarantee.

On 13 January 2020 DBT made demand for payment from Lombard of the full amount then payable under the guarantee. Lombard in turn demanded payment from the appellants for the same amount. When payment was initially withheld by Lombard, DBT brought proceedings against Lombard and TCP in the High Court. Lombard and TCP defended the matter, alleging fraud on the part of DBT in exercising the guarantee. Lombard then joined the appellants amongst others as third parties to the proceedings calling for them to be declared jointly and severally liable for the amounts claimed under the guarantee.

After being joined to the proceedings, the appellants did not file any affidavits or take any further steps. TCP was later liquidated, and Lombard entered into a settlement agreement with DBT whereby the sum claimed by DBT was reduced to R100 million and paid by an order of court dated 1 February 2021.

What remained was the third party proceedings between Lombard and the appellants. The appellants then sought condonation for the late filing of answering affidavits and raised defences of fraud as against DBT, that they had been released from their obligations, that they had lost the right to contest DBT's claim and a defence of estoppel.

The Court *a quo* held that it was not required to make a finding of fraud, dismissed the remainder of the defences, and declared the appellants jointly and severally liable to Lombard for the settled amount with interest.

On Appeal

On Appeal the appellants argued that Lombard could not claim indemnity in terms of the third party procedure the appellants were entitled to contest DBT's claim which was compromised by the settlement. The appellants also contended fraud on the part of DBT in making the call on the guarantee, which was an allegation which in their view remained unresolved.

The SCA found that liability under a guarantee could only be avoided if fraud manifested on the part of the beneficiary. By extension of that same reasoning, liability could only be avoided under the indemnity if there was fraud on the part of both DBT and Lombard. The appellants' case was that Lombard did not properly investigate the claim under the guarantee. The court however held that it is not the obligation of the guarantor to investigate the underlying contractual position as between DBT and TCP when a valid claim had been made in terms of the guarantee.

The court also held that the High Court was correct in not deciding the issue of fraud after the settlement had been made an order of court, as DBT was no longer a party to the proceedings and the decision as to alleged fraud on its behalf could not be made in its absence.

In respect of the procedural defence of its rights being compromised by the settlement, the court held that the appellants were vested with procedural rights when the third party notices were served which included the right to contest the claim of DBT against Lombard. The settlement did not remove those rights, rather the appellants simply failed to exercise them while DBT was still a party to the proceedings and failed to reintroduce them to the proceedings when opposing the claims by Lombard.

During the argument the appellants asserted that their liability to Lombard was first dependant on a court reaching a definitive finding that Lombard was liable to DBT. The court dismissed this argument too, stating that the terms of the indemnity were not dependent on a finding of a court to that effect.

The appeal was accordingly dismissed with costs.

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[1] *Bonifacio and Another V Lombard Insurance Company Limited* para 16.



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