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The Legal Position Concerning Strict Compliance With The Stipulations In A Demand Guarantee

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Sasol Oil (Pty) Ltd ("Sasol") and Golden Sun Retailers (Pty) Ltd ("Golden Sun") had an agreement in terms of which Sasol would provide fuel on credit to Golden Sun. As security for its obligations to Sasol, Golden Sun concluded a General and Commercial Guarantee Facility with Lombard Insurance Company Limited ("Lombard") in terms of which, *inter alia*, Lombard would issue a demand guarantee in favour of Sasol on Golden Sun's behalf ("Agreement"). The security for such facility was, *inter alia*, sureties provided to Lombard by the Appellants and a counter-indemnity by Golden Sun.

In terms of clause 1 of the Guarantee:

> *'Payment shall be made under this guarantee upon receipt by the Guarantor, at the above stated address, of the Beneficiary's first written demand, which written demand will state that the amount of R60 500 000.00 (SIXTY MILLION FIVE HUNDRED THOUSAND RAND) or any lesser portion thereof, is now due and payable by the Client to the Beneficiary. The Beneficiary shall also produce the original guarantee should the Guarantor so require.'*

The 'above stated address' was Sasol's address, namely 32 Hill Street, Randburg.

Thus, payment of the demand guarantee was on receipt by Lombard of Sasol's written demand, of the amounts due and payable by Golden Sun, at Sasol's address. On 20 October 2016, Sasol delivered a demand for payment in terms of the demand guarantee by hand to the business premises of Lombard.

On 27 October 2016, after having considered and being satisfied of the correctness of Sasol's claim, Lombard paid Sasol the full amount demanded. Accordingly and in exercising its security, Lombard demanded Golden Sun and the Appellants the monies paid in terms of the demand guarantee.

A second demand was rendered by Sasol for a further smaller amount, which was similarly delivered and honoured by Lombard a short while later.

Lombard then looked to the Appellants and to Golden Sun for payment of the facility amounts outstanding, which were not honoured, resulting in Lombard instituting proceedings in the Johannesburg High Court against the Appellants for payment.

The Appellants' primary defence to Lombard's claim for repayment of the sums paid on the demand guarantee was that there was no proper demand by Sasol to Lombard in terms of the demand guarantee as the demand was made at Lombard's address and not Sasol's address as stipulated in the Agreement. The Appellants further argued that the demand guarantee was subject to strict and precise compliance in all respects just like a letter of credit, and therefore the Appellants argued that Lombard had no legal duty to fulfil the demands of Sasol and as a consequence no legal obligation existed to warrant the compensation that Lombard was claiming from the Appellants.

The court a quo granted judgment against the Appellants in the amount claimed by Lombard together with interest and costs.

On appeal, the SCA undertook a purposive and pragmatic interpretation of the demand guarantee in order to ascertain whether there was compliance with the terms thereof under circumstances, where Sasol's demands for payment were made at Lombard's address instead of Sasol's. To support its approach to interpretation the court mainly relied on the approach, which was set out by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA593 (SCA), in which the court held that the interpretation is the process of attributing meaning to the words used in the document, having regard to the context provided by reading the particular provision in light of the document as a whole and the circumstances associated to its coming into existence.

The court held that a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results, which undermine the apparent purpose of the document.

The demand guarantee given enabled Golden Sun to purchase fuel on credit from Sasol and as such was intended to protect Sasol from any default by Golden Sun. The primary purpose of the demand guarantee was to provide payment to Sasol on the happening of a specified event – namely the making of a proper demand. The court held that the presentation of the demand, although the address was wide of the mark, was effective. It further held that the requirement of demand being at Sasol's address was directory and not mandatory and therefore found that the demand was properly made and Lombard's obligation to pay was triggered. The importance of the 'directive' was to ensure receipt of the demand by Lombard, which was achieved. The SCA upheld the court a quo's decision.

IMPORTANCE OF THIS CASE

This case clarifies that demand guarantees do not need to be strictly, but sufficiently complied with taking into account the broad context of the guarantee and the purpose for which it was made.

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