

To interdict or not to interdict: Parties continue to fall in the same pitfalls

15 June 2022 4 min read

Securing an interdict

It has long been held, per *Loomcraft Fabrics CC v Nedbank Ltd and another* [1996] 1 All SA 51 (A) (the Loomcraft case), that a demand guarantee is akin to an irrevocable letter of credit, which establishes a contractual obligation on the part of the bank to pay the beneficiary on the occurrence of a specified event, and is wholly independent of the underlying contract in terms of which the guarantee is supplied by way of security.

It is also established law, that the **only** basis upon which a party may seek to interdict the payment of sums claimed on an on-demand guarantee, is that of fraud on the part of the beneficiary.

That position was recently further cemented in the case of *Exxaro Coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd and Another* (Case no 169/2021) [2022] ZASCA 76 (27 May 2022) which came before the Supreme Court of Appeals (SCA) for purposes of a ruling concerning whether strict compliance with the stipulations in an on-demand guarantee was required in order to succeed in securing an interdict against payment on a guarantee.

The appeal was brought by Exxaro Coal Mpumalanga (Pty) Ltd (Exxaro) against a judgment of the Gauteng Division of the High Court, Johannesburg (High Court) which had found that strict compliance with the terms of the guarantee by the guarantor bank was necessary, and as such TDS Projects Construction and Newrak Mining JV (Pty) Ltd (TDS Projects) sought and successfully obtained an interdict in the court *a quo*.

The background is typical of a construction project:

In 2018, Exxaro and TDS Projects concluded a written agreement for the construction of the mechanical and electrical plant, civil, building, and engineering works for Exxaro (the contract).

In terms of the contract, TDS Projects was required to secure its obligations to Exxaro in the form of a performance guarantee in an amount of approximately R32 million (guaranteed amount). The guarantee was issued by Absa Bank Limited (Absa) and was subject to the following terms:

- the guaranteed amount would be paid to Exxaro on receipt by Absa of a written demand stating that such an amount was due and payable;
- written demands would be signed by a person warranting that he/she was duly authorised to do so;
- the guarantee would expire on a specified date (expiry date) and any claim and statement would have to be received by Absa before the expiry date; and
- after the expiry date, the guarantee would lapse and any statement received thereafter would be ineffective.

On 10 June 2020, prior to the expiry date and after Exxaro terminated the contract due to alleged breaches by TDS, Exxaro sent a demand to Absa claiming payment of the guaranteed amount (first demand). Absa rejected the first demand on the basis that the sum was 'deemed

unfit for processing'. Exxaro sent another demand (second demand) claiming the reduced sum of approximately R22 million.

Interdict application

TDS Projects then brought an interdict application in which it sought to interdict Exxaro from demanding, and Absa from paying any amounts under the guarantee, pending an order declaring the first and second demands (demands) invalid.

In support of its application TDS Projects alleged *inter alia* that:

1. the demands by Exxaro were fraudulent (the ground of fraud);
2. the demands did not comply with the terms of the guarantee (the technical grounds) as the demands:
 - were not signed by a person warranting that they had the authority to do so;
 - failed to state the amount claimed was due and payable; and
 - did not indicate the respects in which TDS Projects had breached the contract.

The court *a quo* did not deal with the allegations of fraud, as it was of the view that the non-compliance with the terms of the guarantee was dispositive of the matter.

On appeal, TDS abandoned the grounds of fraud and persisted with the technical grounds as constituting the basis for the grant of an interdict. In rejecting this and reaffirming the position that the guarantee, the SCA undertook a pragmatic interpretation of the demands. To support its approach the SCA relied on the Loomcraft case.

The SCA considered the requirements to grant a final interdict and held that non-compliance with the terms of the guarantee by Exxaro in making its demands did not constitute a violation of any of TDS Project's rights. TDS would always retain its rights to proceed with a damages claim against Absa should it so wish, and as such had a satisfactory remedy available to it.

The SCA accordingly found that the court *a quo* had erred in granting the interdict in TDS Project's favour and the appeal was upheld. The line of authorities confirming the autonomy of guarantees.



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