REPORTABLE

CASE NO: SA 29/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

STANDARD BANK NAMIBIA LTD	**Appellant**

and

KARIBIB CONSTRUCTION SERVICES CC	**First Respondent**
FIRST NATIONAL BANK OF NAMIBIA	**Second Respondent**
BPO LOGISTICS CC	**Third Respondent**
DF MALHERBE AND PARTNERS	**Fourth Respondent**

Coram:	MAINGA JA, HOFF JA and FRANK AJA
Heard:	**10 April 2019**
Delivered:	**9 October 2019**

Summary: Demand guarantees are widely used in commercial transactions and are important, because of their nature they are regarded ‘as valuable as a promissory note’, and their beneficiaries are entitled to payment pending the resolution of any contractual disputes that may arise.

An obligation under a demand guarantee is wholly independent of the underlying contract except where there is proof of fraud on the part of the beneficiary. The alleged fraud must be apparent from the document which embodies the demand guarantee rather than the underlying contract.

On appeal – held, that a letter addressed by appellant to second respondent constituted a demand guarantee. The appellant may not refuse to perform in terms of this demand guarantee on the basis that a dispute in respect of a construction agreement had not been resolved between first and third respondents.

The appeal from a decision of the court *a quo* dismissed with costs.

APPEAL JUDGMENT

HOFF JA *et* FRANK AJA (MAINGA JA concurring):

[1] The issue in this appeal is whether, the appellant Standard Bank Namibia Ltd (Standard Bank) may raise a subsequent dispute between the third respondent BPO Logistics CC (BPO) and the first respondent Karibib Construction Services CC (Karibib Construction) on a construction agreement, to avoid its undertaking made to second respondent First National Bank of Namibia (FNB) in its letter dated 14 December 2012, once the terms of its undertaking had been satisfied.

[2] BPO is Standard Bank's client which rented property in Walvis Bay and sub-let it to Namport for shipping containers. On 15 August 2012, Karibib Construction submitted a quotation to BPO in the amount of N$2 250 000 for the construction of a motor vehicle parking area at the leased property.

[3] The payment details on the quotation stated that 50 per cent of the contract amount was payable prior to the commencement of the work as a cash deposit, the balance on completion of the works. BPO accepted the quotation and issued a

purchase order on 11 September 2012. Karibib Construction commenced with the works on 20 September 2012 before it had received the 50 per cent deposit from BPO.

[4] BPO however, failed to pay the deposit. This was due to a failure to obtain the necessary finance from its bank (Standard Bank). BPO undertook to pay the deposit as soon as it had secured the necessary finance.

[5] Standard Bank subsequently, during November 2012, approved a credit facility for BPO to finance the works. The credit facility was made subject to the registration of a bond over the leased property in favour of Standard Bank.

[6] After working for three months on the project without payment Karibib Construction stopped the works and abandoned the site in December 2012. At the beginning of December 2012, Karibib Construction requested an overdraft facility from FNB since it experienced financial difficulty.

[7] In order to obtain the overdraft facility (of N$600 000) from FNB, Karibib Construction asked BPO to issue it with a letter or guarantee confirming that the deposit (to which it was entitled in terms of the quotation) would be paid into its bank account with FNB. On 14 December 2012, Standard Bank issued such a letter to FNB. The content of this letter will be referred to in detail hereunder.

[8] On 18 April 2013, BPO informed Karibib Construction that it had secured the required deposit, indicating that the deposit would be transferred into Karibib Construction’s bank account only after a contract with ‘clear terms’ had been

concluded between Karibib Construction and BPO.

[9] Karibib Construction on its part demanded to be paid compensation (N$350 000) by BPO for damages it had allegedly suffered, in addition to the deposit stipulated in the quotation. Karibib Construction was unwilling to sign a new contract as requested by BPO. A stalemate ensued with Karibib Construction refusing to return to site and BPO unwilling to meet the demand of Karibib Construction. BPO cancelled the agreement (quotation) on 24 May 2013.

[10] Per letter dated 14 December 2012, Standard Bank informed the Usakos branch of FNB as follows:

> 'Acting under instructions received from BPO Logistics CC we advise that we undertake to pay the sum of N$1 293 750 (One million two hundred and ninety three thousand seven hundred and fifty Namibia Dollars only), being 50% deposit to Karibib Construction Services CC for work to be performed as per quotation dated 15 August 2012.
>
> This amount will be paid to your account with First National Bank, Usakos upon advice in writing from DF Malherbe and Partners that the following transaction has been registered in the Deeds Office, Windhoek:
>
> > "Registration of a Covering Mortgage Bond in favour of Standard Bank Namibia Limited over the lease No 1 and No 3 on Portion 196, Walvis Bay Town & Townlands registered in name of the Municipality of Walvis Bay."
>
> Should any circumstances arise to prevent or unduly delay registration of the abovementioned transaction we reserve the right to withdraw here from by giving you written notice to that effect, whereupon the said sum will no longer be held at your disposal.'

[11] When called upon to honour the undertaking in the letter, Standard Bank refused as its client, BPO, informed it that a dispute arose between it and Karibib

Construction and that the work had ceased on the project and the contract between the parties had been cancelled and hence Karibib Construction was not entitled to payment.

[12] FNB (and Karibib Construction's) stance is that the letter from Standard Bank constituted a demand guarantee and as the conditions stated in it was fulfilled by the bond being registered over the property on 26 April 2013. Standard Bank had to perform according to its tenure. Standard Bank's stance is that the letter is ‘essentially based on the underlying performance in terms of a construction offer made by Karibib Construction to BPO Logistics and cannot be construed as a performance guarantee’. It maintains that as a result of the dispute between the parties as to what remuneration Karibib Construction is entitled to, it is not in a position to pay out any amount based on the letter ‘unless an unequivocal and written instruction is received from BPO Logistics to make such payment’.

[13] Because of the deadlock between the two banks referred to above, Karibib Construction brought an application in the High Court to essentially compel Standard Bank to make payment pursuant to the letter. The court *a quo* found in its favour and gave an order spelling out how payment had to be effected. The appeal lies against this order.

[14] I need to mention in passing that apart from the contention that the letter did not constitute a demand guarantee the defence was also raised that Karibib Construction was not entitled to the money as it knew it was not due following the cancelation of the contract, and that to claim it amounted to fraudulent action.

[15] When it comes to demand bonds or guarantees this court dealt with the characteristics and nature by quoting South African and English authorities with approval as follows:[1]

> '16 Although sweeping categorisations by label must be avoided and the legal character of each guarantee must be ascertained with reference to its terms, purpose, effect and application, the different types of demand guarantee share many common attributes. They all contemplate payment of an obligation by the guarantor upon demand made by the beneficiary. As such, they are 'readily, promptly and assuredly realisable' and accord the beneficiary 'a means of immediate compensation without the need to go through arbitration, negotiation or litigation', not unlike the position as regards documentary letters of credit. It is widely recognised in international case law that, except for certain nuanced differences, instruments of this nature (most often in the form of performance guarantees) are similar in effect to letters of credit and, importantly for purposes of the discussion that follows, are founded on essentially the same legal principles. Those principles, fundamental to the law relating to letters of credit, are twofold: (i) the autonomy of the credit; and (ii) the doctrine of strict performance.
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> 17 Dr Henning forcefully emphasised the importance and application of the autonomy-principle to the Stocks guarantee with reference to quotations from a number of South African cases, such as *Phillips & Another v Standard Bank of South Africa Ltd & Others, Ex parte Sapan Trading (Pty) Ltd and, in particular, Loomcraft Fabrics CC v Nedbank Ltd & Another*. An exposition of this principle is also given in *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & Others*, where the South African Supreme Court of Appeal said the following:
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> > "The guarantee by Lombard is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of which is the establishment of a contractual obligation on

[1] *Standard Bank of South Africa Ltd v Council of the Municipality of Windhoek* 2016 (1) NR 51 (SC) paras 16-18 at 59-60.

> the part of a bank to pay the beneficiary (seller). This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold. Whatever disputes may subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned. The bank's liability to the seller is to honour the credit. The bank undertakes to pay provided only that the conditions specified in the credit are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary. This exception falls within a narrow compass and applies where the seller, for the purpose of drawing on the credit, fraudulently presents to the bank documents that to the seller's knowledge misrepresent the material facts."

18 Some of these authorities refer to and rely on excerpts from the opinions of Lord Denning MR on the autonomy of these instruments in *Edward Owen Engineering Ltd v Barclays Bank International Ltd and Power Curber International Ltd v National Bank of Kuwait SAK*. In the *Edward Owen* case, he said of performance bonds (labelled “performance guarantees” in this jurisdiction) the following:

> “All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.”’

[16] The legal effect of the demand guarantee is not in dispute. What is in dispute is whether the letter from Standard Bank to FNB does indeed constitute a demand guarantee. The court *a quo* found that the letter taken at face value and

its ordinary grammatical meaning constituted a demand guarantee.

[17] Standard Bank undertakes, albeit under instruction from BPO to pay the mentioned amount, being 50 per cent deposit for services to be performed by Karibib Construction pursuant to a quotation dated 16 August 2012. This simply identifies the parties to the underlying agreement and that what is involved is a deposit required by Karibib Construction. This paragraph does not in any manner whatsoever introduce some conditionality based on the performance of the envisaged work. The condition follows the introductory part and relates to the registration of a mortgage bond and the bank's right to revoke the letter on notice should there be an undue delay in the registration of the bond. It is common cause that the bond was registered and no case has been made that it was not done timeously. We thus agree with the judge *a quo* that the letter by Standard Bank on the face thereof constitutes a demand guarantee. This is the effect of its ordinary grammatical meaning.

[18] Is there in the context of the matter something that disturbs the ordinary grammatical meaning? The quotation is clear. A 50 per cent cash deposit was required 'prior to commencement' of the works. This clearly flies in the face of a provision to make this payment conditional on work already done. Furthermore, why would Standard Bank refer to this deposit and not simply mention that the amount is held as a performance guarantee. A deponent on behalf of Standard Bank stated that it was instructed by BPO 'to give an undertaking . . . that 50 per cent deposit will be paid in contemplation of the construction agreement being entered into and the work done in terms of the agreement'. Despite this instruction nowhere is it stated in the letter that the money will only be available on the basis

suggested. It must also be borne in mind that these types of undertakings are widely used and are important in the world of business,[2] and because of their nature are regarded 'as valuable as a “promissory note", and their beneficiaries are entitled to payment pending the resolution of any contractual disputes that may arise'.[3] In our view, the context of the issuing of the letter by Standard Bank does not detract from its ordinary meaning, but on the contrary reinforces it as a demand guarantee.

[19] Counsel for Standard Bank submits that the intention of the officials of Standard Bank was not to create a demand guarantee but one conditional on the conclusion of an agreement (presumably written) and linked to the performance on the project. It is true that this is what the deponent on behalf of the bank states. It however, beggar believe that a senior bank official with such intention would not have insured that the further conditions made their way into the letter. Be that as it may, the judge *a quo* made short thrift of this submission pointing out that the law is primarily concerned with the external manifestations by parties of their minds. We cannot fault this approach. The letter which is addressed to FNB is, as pointed out above, very clear. How was FNB to know it did not intend to convey what it actually conveyed? The *Ridon*[4] case referred to by the counsel does not assist him. In that case an ambiguous phrase was in dispute whereas in the present matter no ambiguity arises. Further, the *Ridon* case reiterates the accepted test, namely; was there a misrepresentation as to Standard Bank's intention, who made the representation and was the other party misled thereby. In this case the letter

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[2] *Standard Bank* case above para 43 at 71F.
[3] *Cargill International SA & another v Bangladesh Sugar and Food Industries Corporation* [1996] 4 All ER 563 (QB) 569d-e.
[4] *Ridon v Van der Spuy and Partners (Wes-Kaap) Inc* 2002 (2) SA 121 (C). See also *Standard Bank* case above para 48 at 74B-C.

did misrepresent Standard Bank's intention (accepting for the moment that it was not intended to issue a demand guarantee). Was FNB as a reasonable bank misled thereby? The answer is obvious as it advanced credit to Karibib Construction on the basis thereof and it is common cause that the signatories of the letter on behalf of Standard Bank had authority to do so. Like the judge *a quo* we have no hesitation to find that Standard Bank is bound by the letter which was accepted by FNB at face value.

[20] When it comes to a summary of the law in respect of 'demand bonds' we can do no better than to refer in this regard to the judgment of Theron JA, in the South African Supreme Court of Appeal which reads as follows:[5]

> '28 Our courts, in a long line of cases and also relying on English authorities, have strictly applied the principle that a bank faced with a valid demand in respect of a performance guarantee, is obliged to pay the beneficiary without investigation of the contractual position between the beneficiaries and the principle debtor. One of the main reasons why courts are ordinarily reluctant to entertain the underling contractual disputes between an employer and a contractor when faced with a demand based on an on demand or unconditional performance guarantee, is because of the principle that to do so would undermine the efficacy of such guarantees. This court in *Loomcraft* referred to the fact that the autonomous nature of the obligation owned by the bank to the beneficiary under a letter of credit 'has been stressed by courts both in South Africa and overseas'. The learned judge referred to a number of authorities, both local and English to illustrate this point. Similarly, this court in Lombard Insurance, confirmed that the obligation on the part of the bank to make payment on a performance guarantee is independent of the underlying contract and whatever disputes may arise between the buyer and the seller are irrelevant as far as the bank's obligation is concerned.

[5] *Guardrisk Insurance Company Ltd & others v Kentz (Pty) Ltd* [2014] 1 All SA 307 paras 28-29.

> 29 In my view this principle is based on sound reason. It underscores the commercial nature of performance guarantees. In determining whether payment should be made on such a guarantee, accessory obligations are of no consequence. The very purpose of the guarantee is so that the beneficiary can call up the guarantee without having to wait for the final determination of its rights in terms of accessory obligations. To find otherwise, would involve an unjustified paradigm shift and defeat the commercial purpose of performance guarantees.'

[21] This brings us to the last aspect raised on behalf of Standard Bank, namely that to seek enforcement of the 'demand guarantee' amounts to fraud as the beneficiary is demanding money it is not entitled to. This submission is based on the fact that the work had ceased and that Karibib Construction is entitled to remuneration for work done up to cessation for which the remuneration is apparently much less than what is provided for in the guarantee. The first hurdle Standard Bank faces in this regard is that the fraud relied upon must be in the document rather than in the underlying transaction.[6] This is not the position in this matter. In fact it is common cause that Standard Bank issued the letter in the terms it did and that the condition set out in the letter relating to the registration of a bond had been fulfilled. The second hurdle is the fact that the underlying transaction to the 'demand guarantee' is irrelevant to these proceedings to enforce the bond. Whatever claims and counterclaims that may arise between the parties to the underlying transaction is for them to resolve in another forum.

[22] Counsel for Standard Bank submits in conclusion in his heads of argument that: 'ultimately it is fundamentally unfair that (Karibib Construction) can be permitted to rely on an undertaking between two banks to extort money which it is not entitled to from (BPO Logistics)'. That demand guarantees can work unfairly to

[6] *Standard Bank* case, above para 44 fn 36 and *Guardrisk Insurance* case above at para [17].

the persons involved in transactions underlying it is part of the nature of the beast and follows from its autonomous nature as was pointed out by this court in dealing with the risks involved in these instruments:[7]

> '. . . As it is, demand guarantees, by their nature and application, impose heavy risks on account parties (- - -). (a) The autonomous nature of demand guarantees deprives them of the right to resist payment of the guarantee on grounds which would otherwise be well-founded had the demand been based on the underlying agreements — the obligation to pay demand guarantees is not even extinguished if the underlying agreement is cancelled on valid grounds. (b) . . . (c) . . . (d) The account party is financially exposed to the possibility of unfair demand or abuse of the guarantee, etc.'

[23] The call for fairness on behalf of the Standard Bank's counsel can thus not be acceded to.

[24] It follows from the reasons mentioned above that the appeal is bound to fail.

[25] The costs should follow the cause.

[26] Accordingly we make the following order:

> The appeal is dismissed with costs, such costs to include the costs of one instructed and one instructing legal practitioner.

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HOFF JA **FRANK AJA**

[7] *Standard Bank* case above para 23.

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MAINGA JA

APPEARANCES:

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