REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

20/2/2023
DATE

SIGNATURE

CASE NUMBER: 21730/19

In the matter between:

LUCA BECHIS Plaintiff

and

ABSA INSURANCE COMPANY LIMITED Defendant

J U D G M E N T

DOSIO J:

INTRODUCTION

[1] This is a provisional sentence action wherein the plaintiff sues the defendant for payment of an amount of R1 120 007-70 based upon a variable construction guarantee ('the guarantee').

[2] The guarantee was issued by the defendant in respect of the performance of a contractor under a JBCC Series 2000 Principal Building Agreement ('the JBCC agreement'). The contract was concluded between Batir Construction CC ('Batir') and the plaintiff, as the employer.

[3] The defendant has opposed the granting of provisional sentence submitting that:

(a) the guarantee is time-barred and has expired and that the claim has prescribed;

(b) the claim is fraudulent;

(c) the clauses 4 and 5 of the guarantee provide for two mutually exclusive bases upon which payment can be claimed by the plaintiff and that once the plaintiff has made an election in respect of the one, he is precluded from claiming in the alternative on the other.

[4] During argument, the defendant's counsel raised an additional defence stating that there is no liquid document and that accordingly, together with the other defences raised, provisional sentence should be denied and in the alternative, that the defendant be granted leave to file a plea.

BACKGROUND

[5] On 3 December 2012, the defendant, as the guarantor, issued a guarantee in favour of the plaintiff for the maximum guaranteed sum of R3 500 024-28. The guarantee was issued on behalf of Batir to the plaintiff, arising from the JBCC agreement.

[6] In terms of the JBCC agreement, the plaintiff employed Batir to effect renovations and additions to existing buildings and external works at erf 931 and 13635, Constantia, Cape Town.

[7] Clause 1.1.3 of the guarantee stipulates, reducing of the guaranteed sum to the amount of R 1 120 007-77 for the period from and including the day after the date of the practical completion certificate and up to and including the date of issue of a certificate of 'final completion' or the date of issue of the last final completion certificate.

[8] The plaintiff's principal agent, being Metropolis Designs CC ('the principal agent'), had full authority to issue the certificates referred to above.

[9] On 24 August 2017, Batir was placed under a provisional order of winding-up. On 20 October 2017, Batir was finally liquidated.

[10] The plaintiff has claimed payment under two alternative clauses of the guarantee, namely:

(a) Clause 5.2 of the guarantee, which enables the plaintiff to claim payment under the guarantee by delivering to the defendant a demand stipulating that a provisional or final liquidation order has been granted against the contractor and calling up payment under clause 5 of the guarantee, and transmitting to the defendant a copy of the liquidation order; and

(b) Clause 4 of the guarantee, which enables the plaintiff to claim payment under the guarantee upon delivery of the documents stipulated in clauses 4.1 to 4.3 of the guarantee, namely:

i. a first written demand to the contractor calling for payment of a sum certified by the principal agent under an interim or final payment certificate which has not been made in terms of the JBCC agreement;

ii. a first written demand to the defendant stating that payment from the contractor had not been made within 7 days of the date of demand and calling upon payment from the guarantor; and

iii. a copy of the relevant payment certificate.

[11] It is common cause that on 26 September 2014 practical completion of the works as a whole was achieved which had the effect of reducing the guaranteed sum to the amount of R1 120 007-77.

[12] On 27 September 2018 the principal agent issued the final payment certificate in which it certified that Batir was indebted to the plaintiff in the amount of R1 512 921-66.

Whether the guarantee has expired and whether the claim has prescribed

[13] The plaintiff's counsel argued that the defendant's reliance upon the terms of the JBCC agreement to escape payment under the guarantee is impermissible, in that the defendant is obliged to perform under the guarantee, provided that the plaintiff has delivered the documents it is required to deliver. Further, even if the defendant were entitled to rely on the terms of the JBCC agreement to avoid payment under the guarantee, its analysis of those terms is fundamentally

flawed as a final completion certificate has not been issued or deemed to have been issued and

consequently, the defendant has not been released from liability under the guarantee. In addition, counsel argued that the guarantee has not been extinguished by prescription.

[14] The plaintiff contends that the guarantee is independent of the JBCC agreement. Accordingly, the plaintiff contends that prescription under the two instruments, namely the guarantee and the JBCC agreement do not run in parallel. The debt under the guarantee arose, and consequently prescription began to run, in accordance with the terms of the guarantee and not in accordance with the terms of the JBCC agreement.

[15] Counsel contends that it has claimed the amount due correctly in that:

(a) On 22 October 2018 the principal agent sent a copy of the final payment certificate to Batir's liquidators.

(b) On or about 17 December 2018, the plaintiff called up payment of the reduced guaranteed sum of R1 120 007-77 by delivering first written demand, issued in terms of clause 5.2 of the guarantee, together with a copy of the court order liquidating Batir, and the original guarantee, to the defendant at its physical address, thus satisfying the requirements of the guarantee.

(c) No payment was made within seven days of the plaintiff's demand.

(d) As an alternative to claiming payment of the guarantee in terms of clause 5.2 thereof, the plaintiff sent a first written demand in terms of clause 4.1 of the guarantee to Batir's liquidators on 29 January 2019.

(e) On or about 8 April 2019, the plaintiff sent a first written demand to the defendant at the defendant's physical address, with a copy to Batir's liquidators in accordance with clause 4.2 of the guarantee.

(f) No payment was forthcoming within 7 days of the Plaintiff's demand.

[16] The plaintiff's counsel contends that under the guarantee, the debt became due when the plaintiff issued its demands on 17 December 2018 and 8 April 2019, which is within three years of service of the summons in mid-2019. Alternatively, at the very earliest, the debt became due when Batir was provisionally liquidated on 24 July 2017, in respect of the demand under clause 5.2 of the guarantee or when the final payment certificate was issued on 27 September 2018, in respect of the demand under clause 4 of the guarantee.

[17] The plaintiff contends that the construction timeline on which the defendant relies does not reflect the provisions of the JBCC agreement. Furthermore, the defendant has sought to rely on provisions of the JBCC agreement without quoting the provisions on which it relies, or

attaching a copy of the agreement. The plaintiff contends that the defendant has incorrectly summarised the JBCC agreement and in the event that this Court accepts the defendant's summary of the JBCC agreement, the timeline is unsustainable.

[18] The defendant's counsel contends that the guarantee was not to endure indefinitely and that the plaintiff and defendant agreed to incorporate the terms and conditions of the JBCC agreement relating to the issue of the final completion certificate as a term of the guarantee to determine the expiry date of the guarantee and to determine whether a final completion certificate was deemed to have been issued.

[19] The defendant contends that the words 'Final Completion Certificate' were typed as the expiry date on the front page of the guarantee and that the construction guarantee cannot be read, understood or interpreted in isolation from the JBCC agreement. The defendant contends that the final completion certificate is deemed to have been issued because the guarantee was selected in terms of the JBCC agreement and therefore this Court is obligated to have regard to the terms of the JBCC agreement.

[20] The defendant contends that the JBCC agreement contains deeming provisions in relation to completion and that these provisions are crucial to an inquiry as to whether the guarantee has expired.

[21] The defendant contends that the JBCC agreement provides that within seven (7) calendar days of the date of the practical completion, the principal agent shall issue to the contractor a works completion list defining the outstanding work and defects apparent at the date of the practical completion to be completed or rectified to achieve works completion. The defendant contends that the principal agent failed to deliver a works completion list within seven (7) calendar days of the date of practical completion, as required in terms of the agreement and that failing this, the contractor would have to notify the employer and the principal agent. Further, that if the principal agent did not issue a works completion list within seven (7) days of receipt of such a notice, the certificate of completion would be deemed to have been issued on the date of expiry of the initial notice period and works completion would be deemed to have been achieved on such date.

[22] The defendant contends that the contractor requested the principal agent do a final works completion inspection on 13 November 2014 and that notice was given as contemplated in terms of the construction agreement and that only on 1 December 2014 did the principal

agent issue a document entitled ‘revised work completion list’. The defendant contends that works completion was deemed to have been achieved seven (7) days subsequent to the giving of the said notice by the contractor which was on 21 November 2014 and which was before the issue of the document entitled ‘revised completion list’.

[23] The defendant contends further that the JBCC agreement states that the defects liability period for the works would commence on the date of works completion and end at midnight ninety (90) calendar days from such date. At the end of the defects liability period, the principal agent had to inspect the works. Where the works had reached final completion, the principal agent had to forthwith issue a certificate of final completion to the contractor. Where works had not reached final completion, the principal agent had to issue a defects list to the contractor defining the defects, which had appeared during the defects liability period, to be rectified to achieve final completion. If the principal agent did not issue a defects list within seven (7) days from the end of the defects liability period, the contractor had to notify the employer and the principal agent. If the principal agent did not issue a defects list within seven (7) calendar days of receipt of such notice, the certificate of final completion would be deemed to have been issued upon the date of expiry of the initial notice period and final completion would be deemed to have been achieved on such date.

[24] The defendant contends that the liability period ended on 21 February 2015 and the principal agent did not inspect the works at the end of the defects liability period, as required in terms of the JBCC agreement. Furthermore, the principal agent did not issue a defects list, within seven (7) calendar days from the end of the defects liability period, as required in terms of the JBCC agreement.

[25] The defendant contends the following communications transpired:

(a) On 11 March 2015 the project manager sent an e-mail to the contractor copying an email from the plaintiff notifying both the principal agent and contractor that there was a problem with a glass door.

(b) The contractor called the project manager on 12 and 13 March 2015 informing the project manager that the glass door was attended to.

(c) The contractor called for a defects list which was to be issued by the principal agent. The contractor had been communicating all along with the project manager who was more pro-active.

(d) On 23 March 2015 the principal agent sent an e-mail to the contractor requesting that the contractor meet with the principal agent on 27 March 2015. The contractor

responded to confirm the date.

(e) On 25 March 2015 the principal agent issued a list of items for review at the meeting scheduled for 27 March 2015, however the meeting did not take place.

[26] In summary, the defendant contends that the guarantee expired on 20 March 2015, prior to the plaintiff's demand for payment, such that the claim in terms of the guarantee has prescribed. To illustrate this, the defendant's counsel drew this Courts attention to the following, namely:

(a) The JBCC agreement was concluded during or about 2011;

(b) The guarantee was issued by the defendant on 3 December 2012;

(c) A certificate of practical completion was issued on 26 June 2014 and as a result the value of the guarantee was reduced to R1 120 007-77.

(d) The plaintiff's principal agent failed to issue a works completion list within 7 days after the date of practical completion.

(e) On 13 November 2014 the contractor requested the plaintiff's principal agent to conduct a final works completion inspection with the purpose to prepare a works completion list.

(f) The plaintiff's principal agent failed to issue a works completion list in accordance with the construction agreement and accordingly works completion was deemed to have been achieved on 21 November 2014.

(g) The defects liability period for the works commenced on the deemed date of works completion being 21 November 2014 and was to end at midnight 90 calendar days from this date.

(h) On finalisation of the defects liability period, the principal agent of the plaintiff was to conduct an inspection of the works and if finalised, had to issue a certificate of final completion. If the works had not reached final completion the principal agent had to issue a defects list to the contractor defining the defects which arose in the defects liability period and a period to rectify same in order to achieve final completion.

[27] The defendant does not concede that the list issued on 25 March 2015 constituted a defects list as contemplated in the agreement and in any event it was issued more than seven (7) days following receipt of the notice as contemplated in the JBCC agreement.

[28] The defendant contends that in terms of the JBCC agreement, the certificate of final completion was deemed to have been issued on 20 March 2015 which is the date of expiry of the initial notice period as contemplated in the JBCC agreement and that the guarantee

therefore expired on 20 March 2015. As a result, the contractor wrote to the quantity surveyor who was the employer's agent on 11 May 2015, calling for the return of the original guarantee.

[29] Provisional sentence enables a creditor armed with a liquid document to obtain speedy relief without having to resort to expensive trial proceedings. The learned authors Herbstein and Van Winsen state that:

'The essence of the procedure then and now is that it provides the creditor who is armed which sufficient documentary proof (a liquid document) with a speedy remedy for the recovery of money due to him without having to resort to more expensive, cumbersome and often dilatory machinery of illiquid action.'[1]

[30] A court will ordinarily grant provisional sentence unless 'the balance of probabilities is that the defendant will succeed in the principal case.'[2]

[31] A performance guarantee is virtually a promissory note payable on demand. In the matter of *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [3] the Court held that:

'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.'[4]

[32] A demand guarantee is intended to provide the beneficiary with a high degree of security for payment. The learned author K. Marxen stated that:

'The bank's own payment obligation is therefore independent, abstract and autonomous. There is only a very tenuous link with the underlying contractual relation between the applicant and the beneficiary. It is often reiterated, quite vividly, that any demand guarantee or letter of credit must be and in fact almost is 'the equivalent of cash in hand'. The situation of a party in whose favour a demand guarantee has been issued is, therefore, very comfortable and secure.' [5]

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[1] Herbstein & Van Winsen in *Civil Practice of the Superior Courts of South Africa*, 2 ed at p 484, cited with approval in *Lesotho Diamond Works (Pty) Ltd v Lurie* 1975 (2) SA 142 (OPD) at 144H.

[2] *Estate Late Morton Greene v Spies* 1933 NPD 328 at 330-331, cited with approval in Lesotho Diamond Works (note 1 above) page 145A.

[3] *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976 (CA).

[4] Ibid page 983.

[5] Marxem, K in *Demand guarantees in the construction industry*: a comparative legal study of their use and abuse from a South African, English and German perspective LLD Thesis, University of Johannesburg.

[33] Performance under a demand guarantee may be enforced without reference to the underlying contract which in the matter *in casu* would be the JBCC agreement. In the matter of *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* [6], the Supreme Court of Appeal held that:

'The very purpose of a performance bond is that the guarantor has an independent, autonomous contract with the beneficiary and that the contractual arrangements with the beneficiary and other parties are of no consequence to the guarantor.' [7]

[34] The Supreme Court of Appeal has 'stressed the importance of allowing banks to honour their obligations and irrevocable undertakings without judicial interference and that interdicting banks from paying in terms of a guarantee 'will not usually be granted save in the most exceptional circumstances'. [8]

[35] The defendant's counsel during argument raised for the first time that there is no liquid document in the matter *in casu.*

[36] This Court is aware that the counsel who initially prepared the defendant's heads of argument is deceased, however, this issue of a liquid document was not raised in the opposing affidavit and neither was there leave brought to supplement the defendant's heads of argument to include this defence.

[37] Uniform rule 8(5) requires that

'(5) Upon the day named in the summons the defendant may appear personally or by an advocate or by an attorney who, under s 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the Supreme Court to admit or deny his or her liability and may, not later than noon of the court day but one preceding the day upon which he or she is called upon to appear in court, deliver an affidavit setting forth the grounds upon which he or she disputes liability in which event the plaintiff shall be afforded a reasonable opportunity of replying thereto.' [my emphasis]

[38] Even though there has been non-compliance with Uniform Rule 8(5) this Court has still considered this defence. The defendant's counsel has raised the issue that this is not a liquid document because the end date of the guarantee cannot be determined without extrinsic documentation to determine whether or not there has been a final conclusion. This Court disagrees. The issue raised by the defendant that one has to have resort to the terms of the

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[6] *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 (2) SA 537 (SCA), para [14].):

[7] *Compass Insurance* (note 6 above) para 14.

[8] *State Bank of India and another v Denel Soc Limited* [2015] 2 All SA 152 (SCA) para [7].

JBCC agreement to determine whether it is a liquid document goes against the decision of *Compass Insurance*[9] as well as clause 3.1 of the guarantee.

[39] Clause 3.1 of the guarantee enforces the principal and independent nature of the defendant's obligations under the guarantee. It provides that the defendant acknowledges that:

'Any reference in this Guarantee to the [JBCC] Agreement is made for the purpose of convenience and shall not be construed as any intention whatsoever to create an accessory obligation or any intention whatsoever to create a suretyship.' [my emphasis]

[40] Clause 12 of the guarantee also provides that 'This Construction Guarantee, with the required demand notices in terms of 4.0 or 5.0, shall be regarded as a liquid document for the purposes of obtaining a court order.' [my emphasis]

[41] Accordingly, the defence raised by the defendant that this is not a liquid document is dismissed.

[42] Under clause 1.1.3 of the guarantee, the defendant's liability is reduced to R1 120 007-77 'From including the day after the date of the applicable practical completion certificate and up to and including the date of the only final completion certificate …'

[43] Under clause 4 of the guarantee, the defendant '…undertakes to pay the [plaintiff] the sum certified upon receipt of the documents identified in 4.1 to 4.3' [my emphasis].

[44] Under clause 5 of the guarantee, the defendant '…undertakes to pay the [plaintiff] the Guaranteed Sum … upon receipt of a first written demand from the [plaintiff] to the [defendant] … calling up this Construction Guarantee' [my emphasis].

[45] For purposes of clause 5, the JBCC agreement 'has been cancelled due to the Contractor's default and … the Construction Guarantee [has been] called up in terms of 5.0' [my emphasis] and a 'provisional sequestration or liquidation court order has been granted against the Contractor [allowing] the Construction Guarantee [to be] called up in terms of 5.0' [my emphasis].

[46] Clause 8 requires the defendant to pay within 7 days of receipt of the first written demand.

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[9] *Compass Insurance* (note 6 above).

[47] The plaintiff complied with the provisions in the guarantee.

[48] If this Court has to accept that the JBCC agreement has any bearing on the guarantee, then from the contractual timeline on which the defendant relies, each step is dependent upon and runs from, the preceding step.

[49] The issuing or deemed issuing of a certificate of final completion was dependent upon Batir's service of a notice calling for a defects list. That notice could only be served upon completion of the 90-day defects liability period, which itself was triggered by the date of works completion. The date of works completion is achieved when the principal agent issues a works completion certificate or such a certificate is deemed to have been issued in circumstances where the principal agent failed to deliver a works completion list within seven (7) days of Batir having given notice to the principal agent.

[50] There are two critical flaws in the defendant's timeline which break it and have the consequence that the culminating event, namely the deemed issuing of a final completion certificate, could not have occurred.

[51] These two failures are that firstly the contractor did not give notice in terms of clause 25.3 of the JBCC agreement and secondly the contractor did not give the required notice in terms of clause 26.4 of the JBCC agreement which would have triggered final completion.

[52] Clause 25.3 of the JBCC agreement states as follows:

'Should the principal agent not issue a works completion list, in terms of 25.1 or 25.2.2 within seven (7) calendar days of the end of the inspection period, the contractor shall notify the employer and principal agent. Should the principal agent not issue such works completion list within seven (7) calendar days of receipt of such notice, the certificate of works completion shall be deemed to have been issued on the date of expiry of the initial notice period and works completion shall be deemed to have been achieved on such date.'

[53] There is no dispute that the principal agent did not issue the works completion list.

[54] Batir did not give the notice triggering the seven (7) day period within which the principal agent was required to issue a works completion list. Although the defendant contends that on 13 November 2014, Batir requested a 'final works completion inspection ... thereby

giving the notice contemplated in terms of the construction agreement.' This alleged notice is merely a brief email which reads as follows:

'Afternoon,

Can you please advise if we can meet on Tuesday (18.11.2014) at 14h00 at above contract to walk through for Works Completion.'

[55] The email referred to paragraph [54] does not constitute a request for a 'final works completion inspection', nor does it constitute notice to the principal agent to issue a works completion list. As a result, the defendant cannot contend that the principal agent's alleged failure to deliver a works completion list within seven (7) days of this email triggered a deemed issuing of a works completion certificate and deemed works completion.

[56] The e-mail dated 13 November 2014 is not a call for a completion list and neither does it constitute a notice delivered to both the employer and the principal agent as required, in that it was only delivered to the principal agent. As a result, if there is no works completion, then final completion cannot arise and neither can a deemed issue of a final completion certificate arise.

[57] It is further clear from the correspondence attached to the replying affidavit, that works completion had not in fact been achieved in November 2014 as alleged by the defendant. As late as 3 December 2014, Batir sent an email copying the principal agent advising that it was still endeavouring to reach works completion. The e-mail states:

'Client, architect and myself went through entire contract for two days to inspect completed Works Completion List as previously issued.

Attached please find "updated" Works Completion List as received from the architect….'

[58] Various items were listed and photos added to the e-mail dated 3 December 2014. Furthermore, at the end of the e-mail it was stated:

'I know it is that time of the year but the client won't occupy the Cottage and Pavilion unless ALL items are attended to. Can you please attend to these items from Monday (08.12.2014) up and to Wednesday (10.12.2014).'

[59] The e-mail dated 3 December 2014 is from Batir. Therefore, Batir itself knew that works completion could not have taken place as far back as November 2014.

[60] There is also correspondence exchanged after March 2015, which is the date on which the defendant states that final completion took place. This correspondence is dated 24 July 2015 and is compiled by Batir stating that:

'At some point in time there should be a cut-off date/period for latent defects with regards to finalizing our final claim. Every time I think that I am on top of the latest defect list new items are added. With this I am not implying that the latent defect list should stop but that the final account is finalized and settled including the releasing of my Construction Guarantee.'

[61] From the correspondence dated 24 July 2015, Batir could not have been under the impression that final completion had already been achieved.

[62] There is further correspondence dated 29 June 2017 where the principal agent advices that it is necessary to go through the completion list with the client to show the standard of remedial work before issuing the final works completion certificate for the main house. There is no response from Batir to this e-mail querying the contents thereof.

[63] From the above correspondence, there is nothing to support the defendant's contention that the guarantee fell away because final completion had been achieved. This suggests that the parties understood that final completion had not taken place.

[64] The correspondence at paragraph [54] demonstrates that the contractor did not give the required notices necessary to trigger either works completion or final completion.

[65] Even if the Court is wrong in this regard, as stated previously and in line with the decision of *Compass Insurance*[10], the defendant cannot rely on the terms of the JBCC agreement in interpreting the defendant's obligations in terms of the guarantee which constitutes a separate and distinct document.

[66] Due to the fact that the defendant is not a party to the JBCC agreement, it is not entitled or in a position to suggest that both works completion and thereafter the final completion were both deemed to have been achieved.

[67] Accordingly, the final completion was not achieved or certified and accordingly the defendant cannot rely on the supposed 'deeming' thereof in terms of the JBCC agreement. If

[10] *Compass Insurance* (note 6 above).

works completion did not occur, the consequent steps upon which the defendant relies also could not occur.

[68] The second break in the defendant's timeline is that contrary to the defendant's contentions, Batir did not give notice calling for a defects list at the end of the liability period. The defendant does not and cannot contend that any written notice was given because Batir gave notice by way of a telephone call.

[69] Clause 26.4 of the JBCC agreement states that:

'Should the principal agent not issue a defects list, in terms of 26.2.2 and 26.3.2, within (7) calendar days from the end of the defects liability period, the contractor shall notify the employer and principal agents. Should the principal agent not issue such defects list within (7) calendar days of receipt of such notice, the certificate of final completion shall be deemed to have been issued on the date of expiry of the initial notice period and final completion shall be deemed to have been achieved on such date.'

[70] The alleged telephone conversation was between Batir and the project manager. Neither the principal agent nor the employer were party to this conversation and could therefore not have been notified as required in terms of clause 26.4. Such telephonic correspondence could not serve as notice contemplated by the JBCC agreement as clause 1.5.2 of the JBCC agreement stipulates that the word 'notice' indicates an act carried out in writing and this was done telephonically.

[71] As a result, because Batir did not give the required notice, the seven (7) day period within which the principal agent was required to deliver a defects list, failing which a final completion certificate would be deemed to have been issued, was not triggered.

[72] Consequently, due to a broken timeline caused by the two separate failures on the part of Batir to comply with the agreement, a final completion certificate could not have been deemed to have been issued and therefore the guarantee did not expire.

[73] The defendant's counsel argued that the JBCC agreement was concluded in 2011 which is 11 years ago and that the construction guarantee was issued on 3 December 2012 which is 10 years ago. A construction contract can last as long as it takes to complete the work. The point at which the guarantee was issued and the point when the construction contract was concluded is irrelevant as it is the date when the claim arose that is relevant. The first time that

demand was made in terms of clause 5.2 was on 17 December 2018. As a result, the claim has not prescribed.

Whether the claim is fraudulent

[74] In the matter of *Denel Soc Ltd v Absa Bank Ltd and Others*[11] the Court stated the following:

'The counter-guarantees are also characterised as first demand guarantees, that is, that the guarantor is obliged to pay immediately upon demand being made. The guarantor does not inquire into whether there is a dispute between the party making the demand and the guarantor. Any dispute as to the underlying contract is irrelevant to the obligation to pay.'[12]

and

'With the exception of fraud, a compliant demand has to be paid on first demand. A compliant Demand is one that complies with the requirements of the counter-guarantee, its terms and conditions of payment.'[13]

[75] In the matter of *State Bank of India*[14] the Supreme Court of Appeal held that:

'A bank issuing an on demand guarantee is only obliged to pay where a demand meets the terms of the guarantee. Such a demand, which complies with the terms of the guarantee, provides conclusive evidence that payment is due.'

[76] Where a guarantor wishes to rely on fraud to avoid payment under a guarantee, it has the onus to prove fraud 'clearly and on a balance of probabilities'.[15] Fraud cannot merely be inferred.

[77] The plaintiff's counsel contends that the defendant's reliance on fraud is unsustainable in that the defendant has not begun to establish any opprobrious conduct on the part of the plaintiff, let alone fraud.

[78] The plaintiff's counsel contends that the items on the list sent in on 25 May 2017, are remedial and completion issues and not maintenance issues. These works are (a) Separation of butt-glazed corner (item 1.1); (b) Adjustment of hinges (item 1.14); (c) Bubbling paint (items 1.16 and 2.12); (d) Stair planks bowing or separating (item 1.18); (e) Staining due to water leaks (item 1.20); (f) Jammed sliding door (item 1.23); (g) Spot light missing (item

[11] *Denel Soc Ltd v Absa Bank Ltd and Others* [2013] 3 All SA 81 (GSJ).
[12] Ibid para 5.
[13] Ibid para 6.
[14] State Bank of India (note 8 above) para 9.
[15] Ibid para 10.

1.31); (h) Wall cracks (items 2.3 – 2.7); and (i) Mosaic tiling outstanding (item 2.49). As a result, the plaintiff's counsel contended that the defendant's attempt to avoid payment under the guarantee on the basis of generalised and unsubstantiated allegations of fraud is unsustainable.

[79] The defendant's counsel contended that it is evident from the payment certificate that the plaintiff has knowingly included in the final payment certificate amounts which he is not entitled to. It was contended that the amounts included have not actually been expended but are merely estimates and do not form part of the original scope of works. The amounts relate to maintenance issues and claims for provisional sums and completion work other than repair/rectification work. The defendant submits that none of these amounts are recoverable against the contractor in terms of the underlying construction agreement or in terms of the guarantee. The defendant accordingly submits that the amount of R1 741 956.87, being the Brice Construction quotation amount, must fall to be excluded in any computation.

[80] The defendant's counsel contended that the final account, which forms the basis of the final payment certificate has, to the knowledge of the plaintiff been irregularly issued in that the final account was prepared and issued without reference to the contractor, thereby depriving the contractor from the opportunity to object and dispute the final account. Counsel contended that the payment certificate is an essential component of the demand made on the defendant. It was contended that without a valid final payment certificate reflecting an amount due to the plaintiff, which the contractor has failed to pay, no claim lies against the defendant on the guarantee. Furthermore, to submit a claim in terms of clause 4 of the guarantee, based upon a final payment certificate that was knowingly irregularly issued while representing that it was properly issued, amounts to fraud.

[81] The purpose of the performance guarantee is that the guarantor has an independent autonomous contract and the contractual arrangements between the employer and contractor are of no consequence to the guarantor.

[82] In line with the reasoning of the matter of *Denel Soc Ltd*[16] and *Compass Insurance*[17], the defendant's complaints concerning the final payment certificate and also the supposed changing goalposts reflected in the defects lists are matters between Batir and the plaintiff's

[16] *Denel Soc Ltd* (note 11 above).
[17] *Compass Insurance* (note 6 above).

principal agent, concerning the performance of the JBCC agreement. The contractual arrangements between the contractor and the plaintiff are of no consequence to the defendant.

[83] A bank issuing an on demand guarantee is only obliged to pay where the demand meets the terms of the guarantee. In terms of the case of *Denel Soc Ltd*[18], a demand which complies with the guarantee provides conclusive evidence that payment is due. The guarantor should not enquire into whether there is a dispute between the party making demand and the contractor. Any dispute pertaining to an underlying construction agreement is irrelevant to the obligation on the guarantor to pay. The defendant cannot raise an issue of fraud by incorporating the dispute between the contractor and the employer under the JBCC agreement. The bank's own payment obligation is independent, abstract and autonomous.

[84] In the matter of *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd*[19], the Supreme Court of Appeal stated that:

'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 beneficiary and the principal debtor. One of the main reasons why courts are ordinarily reluctant to entertain the underlying 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'[20]

[85] In the matter of *Guardrisk*[21] the court held that the fraud had not been established because Guardrisk had 'sought…to have this court determine the rights and obligations of the parties in relation to the construction agreement, which on the authorities, this court is precluded from deciding.'[22]

[86] In the matter of *Guardrisk* [23] the Supreme Court of Appeal held that:

'where its terms have been met, there may, at a later stage and after the terms of the guarantee have been met, be an 'accounting' between the parties to finally determine their rights and obligations.'[24]

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[18] *Denel Soc Ltd* (note 11 above).
[19] *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd* (94/2013) [2013] ZASCA 182; [2014] 1 All SA 307 (SCA) (14 November 2013).
[20] Ibid para 28, see also *Loomcraft Fabrics CC v Nedbank Ltd & another* [1995] ZASCA 127; 1996 (1) SA 812 (A)).
[21] Ibid.
[22] Ibid para 22.
[23] Ibid.
[24] Ibid para 27.

[87] If the defendant contends that the plaintiff has taken more than it is entitled under the guarantee it is at liberty to insist on an accounting process showing the amounts that the plaintiff is not entitled to, however, that would be subsequent to payment of the guarantee. The fundamental principle is that if the correct documents are presented, as in the matter *in casu*, the guarantor must pay.

[88] What the defendant has attempted to do is to have this Court determine the rights and obligations of the parties in relation to the construction agreement and has accordingly failed to discharge the onus resting on it to establish fraud on the part of the plaintiff.

[89] The mere fact that the plaintiff believes the amounts relate to completion works and the contractor holds a contrary view, does not amount to fraud.

[90] To succeed on a claim of fraud the defendant must prove that the documents were presented to the defendant by the plaintiff in bad faith, knowing they contained material misrepresentations of fact, upon which the bank would rely and which the plaintiff knew were untrue and incorrect and would not ordinarily be claimable by a contractor in a final payment certificate. Mere error, misunderstanding or oversight on the part of the plaintiff, however unreasonable, does not amount to fraud.

[91] This Court rejects on the probabilities that the first time the contractor had sight of the final payment certificate was on 30 January 2019. Even if the liquidator delayed in forwarding same, that is an issue between the liquidator and the contractor and cannot affect the relationship between the plaintiff and the defendant. This Court also regards as improbable that the final payment certificate which is based on a quote from Brice Construction dated 28 September 2018 was based on assumptions, estimations or contingencies of work which do not form part of the final completion list dated 26 February 2018 or that they were maintenance issues.

[92] Whether or not the recovery statement is properly prepared and whether or not the final certificate has been properly drawn up pursuant thereto, is quintessentially a dispute between the plaintiff as employer and the contractor. It is something that the guarantor accepts the risk of. The fight of whether the final payment certificate is properly issued takes place between the contractor and the plaintiff. To resolve a dispute, before a guarantor can pay out, would defeat the purpose of a guarantee. The guarantor must pay and the fight can occur later. The very fact that a payment certificate was issued triggers an obligation to pay.

[93] The contractor in the matter *in casu* has not sought to fight. These were issues which arose between the plaintiff and the contractor and should have been dealt with in the dispute resolution mechanism contemplated in the JBCC agreement. If the contractor and the liquidators were unhappy about this, they should have raised a dispute, which they both failed to do. Due to the liquidators failing to set aside the final payment certificate, it accordingly remains valid and binding.

[94] This Court does not find it in bad faith for the plaintiff, who has made proper demand in terms of the construction guarantee, to continue to insist on payment of the proceeds of the guarantee.

[95] The plaintiff first proceeded with its claim in terms of clause 5 of the guarantee, and under clause 5 it is not required to present a payment certificate. That only applies under clause 4. Therefore, as far back as 17 December 2018 when the claim for payment was made under clause 5.2 of the guarantee the defendant should have complied without any hesitation.

[96] The contentions regarding fraud all pertain to the circumstances under which the final payment certificate was issued and accordingly relate to clause 4 of the guarantee. None of the payment certificate issues arise in respect to the liquidation claim under clause 5. The defendant's reliance on the evolving nature of the defects list and on the final payment certificate entirely ignores the primary basis upon which payment was demanded under clause 5.2 of the guarantee, which pertains to Batir's liquidation. That has nothing whatsoever to do with the demand under clause 4.2 of the guarantee to which the final payment certificate relates and accordingly fraud cannot be a consideration under clause 5.2.

[97] In the matter *in casu* there is no evidence that the plaintiff knowingly included amounts to which the plaintiff was not entitled and even if there were, the defendant has not established that the plaintiff knowingly presented the misinformation to the bank. The defendant's attempt to avoid payment under the guarantee on the basis of generalised and unsubstantiated allegations of fraud is unsustainable.

[98] Accordingly the defence of fraud raised by the defendant is dismissed.

Whether the claims made in terms of clause 5.2 and 4 of the guarantee are mutually exclusive

[99] The defendant's counsel contends that the two bases provided for under clause 4 and 5 of the guarantee are mutually exclusive. It was argued that once the plaintiff has elected to claim under either of them he is precluded from claiming in the alternative on the other. Counsel argued the two bases are not complimentary to each other as different requirements apply to different circumstances. Counsel contends that the plaintiff can only claim in terms of clause 5 of the guarantee before a final payment certificate has been issued. Once a final payment certificate has been issued the plaintiff can only claim in terms of clause 4 of the guarantee.

[100] Clause 4 permits the plaintiff to claim payment from the defendant in the event of an interim or final payment certificate certifying and reflecting an amount due by the contractor to the plaintiff (employer) which amount the contractor has failed to pay, despite demand. Under clause 5 of the guarantee, the plaintiff is entitled to claim under the guarantee merely on the occurrence of a specified event, namely the cancellation of the construction agreement for breach by the contractor or the provisional and/or final liquidation of the contractor.

[101] It is incorrect for the defendant to state an election to claim under clause 4.1 was already made on 22 October 2018. The e-mail dated 22 October 2018 is not a demand under clause 4.1. This is demonstrated by the subsequent demand in January 2019 which does comply with a first demand in terms of clause 4.1. On 22 October it is clear the plaintiff issued a letter to the liquidator asking that they be paid. The demand in terms of clause 5.2 was made on 17 December 2018. Therefore, the claim in terms of clause 5.2 was made before the claim in terms of clause 4.1. Therefore, it is clear that the election taken was to first proceed under clause 5.2 in December 2018.

[102] It is clear that both bases have different requirements, however, due to the fact that no payment was forthcoming after the plaintiff sought payment from the defendant in terms of clause 5.2, he had no alternative, but to also claim under clause 4. It is clear that the plaintiff fulfilled the requirements necessary under clause 5.2 and clause 4 and by implication could apply under both.

[103] Accordingly, this Court does not find that clause 4 and clause 5 of the guarantee are mutually exclusive and they do not prevent the plaintiff from changing his election to claim payment on the alternative due to the defendant's non-compliance after the initial claim was made under clause 5.

[104] Uniform Rule 8 requires the Court to determine whether the probabilities favour the defendant at trial. From the issues raised in the matter *in casu*, this Court does not find that on the probabilities the defendant has a case.

ORDER

[105] In the result, I make the following order:

1. Provisional sentence is granted in favour of the plaintiff to the amount of R1 120 007-70
2. The defendant is to pay the costs.

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JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 February 2023

Date of hearing:	06 May 2022
Date of Judgment:	20 February 2023

Appearances:

On behalf of the applicant:	Adv. G. Quixley
Instructed by:	Maurice Philips Wisenberg Attorneys
On behalf of the respondent:	Adv. C. Van Der Walt SC
Instructed by:	ENS Africa