**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

..... .....

**Case number: 23125/2014**

**In the matter between:**

**KRISTABEL DEVELOPMENTS (PTY) LTD** **Applicant**

**And**

**CREDIT GUARANTEE INSURANCE CORPORATION OF AFRICA LIMITED** **Respondent**

Performance/credit guarantee – cancellation and demand by beneficiary/applicant of guarantor/respondent - novation alleged – facts examined to ascertain whether or not replacement agreement - terms uncertain and incomplete, claim unenforceable, proposals on calculations of claim still awaited, no external tie-breaker to impasse, references to still-to-be-drafted agreement, unilaterally determined payment made pursuant to credit guarantee, all proposals made 'without prejudice' to rights under guarantee - hence no novation found.

Performance/credit guarantee – compliance challenged – letter of cancellation delivered prior to and not contemporaneous with letter of demand - English and South African cases distinguish between performance guarantees and letters of credit - the latter requires 'strict' compliance - English and South African courts have spelt out why strict compliance

required in letters of credit and reasons for compliance in performance guarantees – South African law not held that 'strict' compliance required with performance guarantees – in casu the reasons for compliance as set out by supreme court of appeal adhered to, deliver of cancellation prior to demand constituted compliance in terms of guarantee.

Performance/credit guarantee - guarantor paid some fifty per centum of the sum demanded under the guarantee in its letter of demand – no challenge raised to compliance or otherwise of demand – guarantor had a choice between 'say nay' or 'pay' and chose to pay – guarantor has waived any right to try to void the demand.

---

**JUDGMENT**

---

**SATCHWELL J:**

**INTRODUCTION**

1. Applicant, who was the employer in a JBCC contract and the beneficiary under a performance guarantee, has claimed the sum of R 12 438 671, 61 premised on a credit guarantee also named the construction guarantee ('the guarantee'). The respondent, the guarantor, has opposed this application firstly, on the grounds of a claimed subsequent agreement of settlement which is alleged to have novated that earlier credit guarantee and secondly, on the grounds of claimed non-compliance with the terms of the guarantee.

2. It seems to me that it is the facts of the matter which are determinative of both issues. Accordingly, I set out the chronology of events which give rise to the disputes before this court. In the main, this is based upon a series of emails between the respective parties' attorneys and for clarity I shall only indicate the sender thereof.

    a. Respondent issued the credit guarantee (31st October 2012).
    b. Applicant cancelled the contract with the contractor third party (on 30th April 2014).
    c. Applicant emailed a copy of the letter of cancellation to the respondent of which receipt was acknowledged (20th May 2014).
    d. Applicant sent a letter of demand to respondent (4th June 2014).
    e. Applicant launched motion court proceedings against respondent claiming payment under the guarantee (26th June 2014).

f. Applicant's attorneys advised that he was instructed that 'our clients met yesterday and have agreed to resolve the matter" on certain terms. (1st August 2014).
g. Respondent's attorneys stated that "I confirm that my client is in agreement with the agreement as you have recorded it in your email below" and advising "I agree that we need to make the mechanism whereby monies are released from the ENS Trust Account, a workable one, given that there may be a disagreement between our client's respective quantity surveyors, in relation to measurement figures. (8th August 2014).
h. Applicant's attorneys confirmed payment of the sum into the trust account, asking whom has been appointed as respondent's quantity surveyor and asking respondent's attorneys to "forward to me your proposals on the assessment mechanism, as mentioned in your last email to me". (15th August 2014).
i. Further correspondence advised details of the respective QS.
j. Respondent's attorneys emailed that he would be "forwarding to you my proposal on the assessment mechanism" and asking whether or not a status report had been drawn up 'at the time of cancellation' and if not, was there 'any record of the status of the works at the time of the cancellation.' (18th August 2014).
k. Further correspondence recorded that the QS had exchanged documentation and were going through documents.
l. Respondent's attorneys emailed that, he would clarify issues with respondents QS, "where after I will be in a position to draw a draft agreement, which I will then send to you." (4th September 2014).
m. There was and continued to be correspondence as to respondent's payment of the monies claimed into their attorneys trust account.
n. Applicant's attorneys emailed that "all of the information forwarded to you by our client was obviously done so as part of the without prejudice engagement taking place between our clients. That being so, please can you come back to me urgently on the finalization of the matter?" (26th September 2014).
o. Applicant's attorneys emailed regarding hoarding provisions and interest claims and stating "I am instructed to record that our client demands your client's overall settlement proposal we [be] forwarded by close of business today." (31st October 2014).
p. Applicant's attorneys emailed advising of applicant's banking details and asking "please will you confirm with me as soon as payment has been made and also the exact amount." (3rd November 2014).
q. Respondent's attorneys advised that "the amount is R 6 060 405.22" (3rd November 2014).

r. Applicant's attorneys emailed that applicant "confirms receipt of R 6 060, 405.22 which it accepts on account and without prejudice to its rights regarding the claim for payment of the balance of the guaranteed amount." and asking for "1. A breakdown of how your client calculated the amount which was paid to our client; and 2. In respect of amounts which were claimed by our client and not paid by your client, your client's reasoning therefor." (11th November 2014).

s. Applicant's attorneys advised that applicant "1. Is no longer prepared to delay this matter any further; 2. Will shortly be issuing summons against your client claiming payment of the balance of the guaranteed amount; and 3. Accordingly withdraws the application under Johannesburg High Court case number 23125/2014, with full reservation of its rights to claim the costs of that application in the action mentioned above." (the date is not set out in the email but it apparently follows on from one from respondent's attorneys dated 19th November).

t. Respondent's attorneys advised of "certain aspects… that are of remaining concern" i.e. those pertaining to hoarding charges and the finance costs and that "my client has made a payment, but that payment is not made in full and final settlement of any particular heads of claim/components thereof. In the circumstances clause 7 of the guarantee remains of application relative to the amounts claimed." (5th December 2014).[1]

u. Respondent's attorneys emailed that the earlier email that day "was also necessarily sent in a without prejudice context and the payment made also in a without prejudice context, and without admission of liability, as also entirely [without] prejudice to all our client's rights including its right in terms of clause 7 of the guarantee." (5th December 2014).

v. Applicant's attorneys responded that applicant does not intend supplementing its founding affidavit and requires respondent to file its answering affidavit by 23rd January 2015. (11th December 2014).

**NOVATION**

3. Applicant maintains that it sues upon the credit guarantee whilst respondent maintains that there was a subsequent agreement which has novated that guarantee. Applicant submits that, at most, there were certain proposals to resolve the dispute and an ongoing attempt to resolve the matter which foundered upon the mechanism of resolution. Respondent contends that the matter was settled either

[1] Clause 7 of the guarantee deals with submission by the employer of an expense account to the guarantor showing how all monies received in terms of construction guarantee have been expended and thereafter refunding to the guarantor any resulting surplus from the payments made in terms of clause 5 (which is the clause providing for the guarantor 's undertaking to pay the guaranteed sum or full outstanding balance upon receipt of the demand).

when the clients "agreed to resolve the matter" on specified terms on or by first August 2014 or when respondent's attorneys confirmed "my client is in agreement with the agreement as you have recorded it" on 8th August 2014. In other words, respondent submits that there was either an agreement reached by 1st August or there was an offer on that date which was accepted on 8th August.

4. The relevant portions of the two documents read as follows:

   The Credit Guarantee – clause 5

   "Subject to the Guarantor's maximum liability referred to in 1.0 or 2.0 , the Guarantor undertakes to pay the Employer the Guaranteed Sum or the full outstanding balance upon receipt of a first written demand from the Employer to the Guarantor at the Guarantors physical address calling up this Construction Guarantee….". The Guaranteed Sum is defined to mean "the maximum aggregate amount of R 20 731 119.36".

   Email of 1st August 2014

   "Our clients have agreed to resolve the matter on the following basis:

   i. "Our client will deliver the original guarantee to your client;
   ii. Your client will then pay the amount demanded by our client into your firm's trust account;
   iii. Our clients QS [quantity surveyor] and one appointed by your client will then assess the further costs incurred since the guarantee was called, together with any additional costs to be incurred and your firm will then pay our client, out of the funds held, on receipt of an instruction to that effect."

5. I am unable to find, on the facts before me, that there has been an agreement in August 2014 which novated the earlier credit guarantee of 31st October 2012. It is my view that this conclusion emerges from the correspondence in which it is sought to found the novating agreement.

6. First, the terms or basis upon which it was advised on 1st August that the clients had met and agreed to resolve the matter are uncertain, incomplete and apparently incapable of being finalized. There is no doubt that the first two of these terms are easily determinable and capable of being enforced. It is simple enough to see whether or not the guarantee has been delivered and to demand same. Equally it is not difficult to check if funds have or have not been paid into an attorney's trust account and to demand that same be done.

7. However, it is the third term which is without certainty, gives no indication of how resolution is to be achieved and is no more than a provisional attempt to resolve the dispute. Regrettably, this term omits to identify anything more than an attempt at a

mechanism to resolve the dispute which is already the subject matter of litigation – payment of R 12 million pursuant to a credit guarantee. What is agreed between the parties (in their emails of 1st and 8th August) is that each party will appoint a quantity surveyor, each of which will assess costs incurred and additional costs and then applicant will be paid "on receipt of an instruction to that effect". Who is "to give an instruction" is not identified especially when there are two quantity surveyors involved and neither has a veto over the other? What amount is to be paid cannot be specified because no one has yet determined an amount and no one has the independent power so to do?

8. In the course of argument I was referred to Christie who wrote that it is "…not uncommon for parties to record the progress they have made in partial agreement thus facilitating the discussion on the points that remain outstanding". If for one reason or another the intended contract is not concluded one party will sometimes seek to hold the other to the partial agreement. Counsel omitted to refer to the remainder of the quote from Christie:

> "Obviously he cannot be permitted to do so, because although the partial agreement may have taken the form of an accepted offer it lacked *animus contrahendi*, being designedly incomplete or provisional".[2]

9. Van der Merwe has usefully summarized the position in regard to what is a known as 'an agreement in principle':

> " …Such preliminary arrangements, are in the main, devoid of obligationary effect.[3] The "principle use is to promote trust" and to enhance possibility "by demonstrating a commitment on the part of the parties to the conclusion of a contract or to place on record progress that has been achieved in negotiations" this enables a review of progress, identifies outstanding issues and provides a basis for further progress towards a binding agreement".[4] In the final analysis, the consequences of such documents depends on the interpretation of their terms in the particular circumstances. Where such a document records a partial agreement the question is whether what has been agreed upon can have an existence independent from what has been left open for later negotiation.[5]

---

[2] Christies *The Law of Contract in South Africa* 6th Ed Christie and Bradford p37.

[3] Van Der Merwe *Contract General Principles* 3rd Ed Van der Merwe et al p78. See also *Kenilworth Palace Investments v Ingala* 1984 (2) SA 1 (C); *Murray & Roberts Construction v Finat Properties* 1991(1) SA 508 (A); *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W) 331; *Lambons Edms (Bpk) v BMW (Suid-Afrika) Bpk* 1997 (4) SA 141 (SCA); *Orda AG v Nuclear Fuels Corporation of SA Ltd* 1994 (4) SA 26 (W); and *Couve v Reddot International (Pty) Ltd* 2004 (6) SA 425 (W).

[4] Van der Merwe above pg78-79. See also *Kenilworth Palace Investments v Ingala* 1984 (2) SA 1 (C); and *Stock v Minister of Housing* 2007 (2) SA 9 (C).

[5] See *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W) 337C; and *Kenilworth Palace Investments v Ingala* 1984 (2) SA 1 (C).

> Should, however, the document reveal an intention to establish obligations and there is sufficient degree of certainty as to the terms agreed to , the label attached to it cannot be decisive. Obligations, even if only of a limited or partial nature might be agreed to and given effect. Misplaced optimism that continuing negotiations will ultimately be successful, however, is not a decisive indication that the document in question was concluded *animo contrahendi*. Statements to the effect that what has been agreed upon is to be worked out in detail or that agreement will still be finalized suggest the absence of a contract.[6]" [all of which judgments my clerk has checked].

10. Secondly, the absence of any ability to reach certainty and finality in terms of this proposal was explicitly anticipated throughout. In respondent's attorneys first response to the proposal, on 8th August, he advised that "I agree that we need to make the mechanism whereby monies are released from the ENS Trust Account, a workable one, <u>given that there may be a disagreement between our client's respective quantity surveyors</u>, in relation to measurement figures". This is clear understanding of the possibility that there may not be agreement between the two QS and that some deadlock-breaking mechanism needed to be agreed upon. Applicant's attorneys agreed therewith in his letter of 15th August when he wrote asking "<u>forward to me your proposals on the assessment mechanism</u>, as mentioned in your last email to me". The response on 18th August was that respondent's attorneys would be <u>"forwarding to you my proposal on the assessment mechanism"</u> [my underlining].

11. It is trite that an undertaking to negotiate further in order to close gaps in the agreement – a so called agreement to agree – is unenforceable and insufficient to cure an incomplete agreement.[7] A breakdown in negotiations would leave the court unable to enforce the agreement.[8] "An agreement to agree may be saved from vagueness where it is linked to a provision providing for a determination of the outstanding issues by a third party"[9] which did not happen in the present instance.

---

[6] *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A); *Murray & Roberts Construction v Finat Properties* 1991(1) SA 508 (A); *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W); *Lambons Edms (Bpk) v BMW (Suid-Afrika) Bpk* 1997 (4) SA 141 (SCA); and *MV Nagivator (No 1): Wellness International Network Ltd v MV Navigator* 2004 (5) SA 10 (C).

[7] Van der Merwe above at pg225. See also *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* 1996 (2) SA 225 (A); *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W); *Finestone v Hamburg* 1907 TS 629; *Cassimjee v Cassimjee* 1947 (3) SA 320 (N); *Roode v Morkel* 1976 (4) SA 989 (A); *Hattingh v Van Rensburg* 1964 (1) SA 578 (T); and *Shell SA (Pty) Ltd v Corbitt* 1986 (4) SA 523 (C).

[8] See *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) pea 35 at pg 431 *Scheepers v Vermeulen* 1948 (4) 884 (O); and *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) 828I.

[9] *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A) at 773 and 776.

There is no such provision - either for appointment of an arbitrator or any means of calculation to constitute a tie-breaker.[10]

12. Where adequate provision has been made for determination of outstanding issues, an agreement (if such were to exist) may yet be found to be effective. The consequences of any agreement which might have been contemplated would have had to have been rendered objectively in the sense that the arrangement adopted must be capable of providing certainty by itself, without the need for further agreement between the parties or the exercise of an unfettered discretion by one of them.[11] An external standard to determine consequences could be laid or a mechanism established by means of a specified formula or, as I have said, an arbitrator. However, in the present instance, where no such external standard or mechanism was determined and was, in fact, left over for respondent's attorney to consider and thereafter to prepare proposals, one can see how the impasse (so described by respondent's counsel) became a deadlock which meant that the agreement never came to fruition.[12]

13. Thirdly, there was apparently lack of agreement on other issues such as the hoarding costs and the interest and finance costs and these, too, occasioned correspondence on 4th September and 5th December.

14. Fourth, the absence of a clear and unequivocal agreement between the parties is indicated by reference by respondent's attorneys on 4th September to the need to resolve outstanding issues "where after I will be in a position to draw a draft agreement, which I will then forward to you". When applicant's attorneys write on 26th September and 31st October that he is wanting feedback on "finalization of the matter and demanding "your client's overall settlement proposal", respondent's attorneys does not and obviously cannot reply that agreement has already been reached, a settlement has been concluded and the matter has been finalized. [my underlining].

---

[10] See *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA).

[11] See *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (A); *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A); *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A); *Boland Bank Bpk v Steele* 1994 (1) SA 259 (T); and *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (30 SA 986 (SCA).

[12] See also *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W); *Patel v Adam* 1977 (2) SA 653 (A); *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A); *Shell SA (Pty) Ltd v Corbitt* 1986 (4) SA 523 (C); *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (A) 576; *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A); *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A); *Boland Bank Bpk v Steele* 1994 (1) SA 259 (T); and *Rustenburg Platinum Mines Ltd v Breedt* 1997 (2) SA 337 (A).

15. Fifth, applicant's claim in its Notice of Motion was for a sum in excess of R 12 million which is the amount of the credit guarantee. Yet the proposal of 1st August is silent on any amount because it has not yet been determined and proves not to be capable of determination by the mechanism proposed and adopted. Thereafter, when a payment is made, applicant's attorney has to write on 3rd November and ask "the exact amount" which has been paid. When informed of the amount paid, applicant's attorney writes again and asks on 11th November how this sum was calculated. It appears that there is no agreement on the amount to be paid to applicant, rather a unilateral imposition of an amount by respondent.

16. How can one novate an agreement which provides for a specified sum of money by another agreement where no one knows the sum of money to be paid or how it is to be calculated? How can one novate an agreement which provides for a specified sum of money when two persons are to do calculations but neither is empowered to finally determine the solution thereto?

17. Sixth, by 26 November, applicant's attorney is stating that the exchange of information between the parties was done "as part of the without prejudice engagement" between the parties and, on 11th November, that receipt of funds was accepted "on account and without prejudice to its rights regarding the claim for payment of the balance of the guaranteed amount." By 5th December, respondent's attorney is claiming the same "without prejudice" protection to both information exchanged and payment made which was done "without admission of liability". [my underlining].

18. Where such exchange of information, discussions and payment are made without prejudice then it can only be because no settlement has come to fruition and thereby no end to the litigation achieved. There may well have been serious attempts at reaching settlement but the ongoing litigation based on the credit or performance guarantee remained a fallback. There cannot have been *animus contrahendi.*

**COMPLIANCE WITH THE GUARANTEE**

19. Clause 5 of the credit guarantee requires a first written demand stating that:

> "5.1 The Agreement has been cancelled due to the Contractor's default and that the Construction Guarantee is called up in terms of 5.0. The demand shall enclose a copy of the notice of cancellation; or
> 5.2 A provisional sequestration or liquidation court order had been granted against the Contractor and that the Construction

> Guarantee is called up in terms of 5.0. The demand shall enclose a copy of the court order."

20. The letter of cancellation reads at par 5-6:

> "(5) Your e-mail to the Employer of 9 April 2014 constitutes a clear and unequivocal rejection by you of your obligations imposed in terms of the JBCC agreement.
> (6) You are hereby advised that the employer accepts your repudiation of your obligations under the agreement, without prejudice to its rights to claim from you such amounts as are due by you to the Employer, and that the JBCC agreement is accordingly terminated with immediate effect".

21. The letter of demand states at par 3-6:

> "(3) On 30 April 2014, and as a result of the contractor's default and repudiation of its obligations arising in terms of the Agreement, we cancelled the Agreement.
> (4) We enclose under cover of this letter, marked as annexure "A", a copy of our letter of cancellation. [my underlining].
> (5) Pursuant to clauses 5.0 and 5.1 of the guarantee, we demand payment from you of the amount of the guaranteed sum, R12 438 671.61.
> (6) Pursuant to clause 8 of the guarantee, we accordingly await payment by you of this amount within 7 days of the date of this letter".

22. It is not in dispute that the letter of cancellation, dated 30th April 2014, was sent to respondent on 20th May 2014. Respondent's attorneys were copied on emails on meetings subsequent thereto during May 2014.

23. It is common cause that the letter of cancellation was not attached to the letter of demand dated 4th June 2014.

24. Respondent argues that there has not been 'strict' compliance with the terms of the credit guarantee by reason of the failure to attach the letter of cancellation to the letter of demand and, with such failure to comply with a peremptory provision of the guarantee, the demand is fatally defective. Applicant argues that 'strict' compliance is not a requirement, that the letter of cancellation was delivered prior to the letter of demand which constitutes compliance and that, in any event, respondent has waived any entitlement to require applicant to attach the letter of cancellation to the letter of demand.

25. The first issue is that of prior as opposed to contemporaneous presentation of the letter of cancellation. The second issue is that of waiver.

**Compliance**

25. The first issue is whether or not 'prior' compliance rather than 'contemporaneous' compliance in the context of this particular matter means there has not been the required compliance with the credit guarantee.

26. In *Lombard Insurance Holdings (Pty) Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA), the court stated that performance guarantees are "not unlike irrevocable letters of credit where the bank undertakes to pay provided only that the conditions specified in the credit are met".

27. In *Loomcraft Fabrics CC v Nedbank Limited and another* 1996 (1) SA 812 A, concerned with irrevocable documentary credits, was stated that what must be "presented to the bank of the documents specified in the credit, including a set of bills of lading, which on their face conform strictly to the requirements of the credit" (at page 815G). The court affirmed that the documents (such as bills of lading) on which the letters of credit are sought to be paid are to 'strictly' conform to requirements.

28. In *OK Bazaars (1929) Ltd v Standard Bank of South Africa Limited* 2002 (3) SA 688 (SCA) at para [25] was stated that "if the presented documents do not conform with the terms of the letter of credit the issuing bank is neither obliged nor entitled to pay the beneficiary without its customer's consent. … there is, of course, no doubt that the bank has to comply strictly with the instructions that it is given by its customer. It is not for the bank to reason why. … the Bank must conform strictly in the instructions which it receives". Nugent JA confirmed the conformity required of the presented documents and the strict conformity required of the bank.
29. The distinction between performance / construction guarantees and letters of credit has been explained in *Siporex Trade SA v Banque Indosuez* [ 1986]2 Lloyds Rep 146 at 159 where Hirst J said that the "contrast" between a letter of credit and a performance guarantee was "sound", since with the former the bank deals with the documents themselves, whereas with the latter the guarantor can rely on a statement that a "certain event has occurred". This statement was approved by the Court of Appeal in *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* ([1990] 2 Lloyd's Rep 496 (CA) at 501 where Staughton LJ said that there is less need for a doctrine of strict compliance in the case of performance bonds. But he said also that 'it is a question of construction of the bond'."

30. Accordingly, the English courts (followed by the South African courts) have, thus far, taken the approach that there is a difference or 'contrast' between a guarantee where the call is simply based on the say- so statement of the one party that an

event has occurred and between letters of credit where the bank is in possession of documents (such as bills of lading) establishing the foundation of the call. The courts have indicated that the more 'strict' compliance is required of the banks and of the documents presented to activate letters of credit because the banks themselves are in a position to evaluate the call by perusing the various documents. No mention has been made of the degree of rigour of compliance in the case of performance guarantees.

31. Our courts have not yet found necessary to determine whether or not 'strict' compliance is required of the beneficiary under a performance guarantee. In *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd*[13] the Supreme Court of Appeal left this issue of 'strict' compliance in the case of guarantees open for decision on another occasion

32. In *Compass supra,* the terms of the guarantee required (as in this matter) that the letter of cancellation be attached to the letter of demand. In that case, the court found that there had been 'no compliance' at all because there had, in fact, been no letter of cancellation extant at the time that the letter of demand was sent and so the letter of cancellation could therefore never have been attached. In fact, there was only a belief or 'knowledge' that the required condition for breach, i.e. liquidation, had taken place – no one was in possession of the requisite order which was expressly required to be attached to the demand. Absent attachment, there could be no compliance at all.

33. In *Compass supra*, the court reiterated the need for compliance:

> "It should not be incumbent on the guarantor to ascertain the truth of the assertion made by the beneficiary that the subcontractor had been placed under provisional liquidation. That is why Compass Insurance required a copy of the order itself. Similarly the guarantor should not have to establish whether a contract has in fact been cancelled. That is why a copy of the notice of cancellation, if there has in fact been cancellation, is required to be attached to the demand (clause 4.1). 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." [14]

34. In the present case, the notice of cancellation did exist. It was sent to the guarantor and received by the guarantor. Guarantor's attorneys were also copied on the correspondence arranging meetings to discuss this cancellation in May 2014. The

[13] 2012 (2) SA 537 (SCA).

existence of the cancellation and the reasons therefor were known to the guarantor at the time demand was made.

35. Any quibble about the wording of either the cancellation or the demand is no longer argued by the respondent.[14] The guarantee required the letter of demand to state that "The Agreement has been cancelled due to the Contractor's default and that the Construction Guarantee is called up" while the demand read "On 30 April 2014, and as a result of the contractor's default and repudiation of its obligations arising in terms of the Agreement, we cancelled the Agreement".

36. The only issue is whether or not provision of the notice of cancellation (to the third party) to both the respondent (and its attorneys) independently of and prior to the demand can constitute compliance with the guarantee.

37. The respondent and applicant engaged in discussions by email about this notice of cancellation. The issue was not ignored. Neither was it treated as irrelevant or moot by respondent and applicant. Both guarantor and beneficiary engaged on this cancellation.

38. To require that this notice of cancellation, already received and discussed and engaged upon, be attached to the notice of demand 15 days later is not requiring moonwalking and beneficiary/applicant could certainly have complied therewith. However, to find that failure to attach a written cancellation already received and under discussion, constitutes complete non-compliance with the terms of the guarantee and therefor disentitles the beneficiary/applicant from proceeding with its demand under that guarantee is, I believe, a step too far. The reasons requiring compliance with terms of the guarantee, especially as restated by the Supreme Court of Appeal in Compass *supra*, are carefully kept in mind in the present instance.

39. According, I find that the prior presentation of the cancellation by applicant to respondent (and to respondent's attorneys) instead of contemporaneous

---

[14] Unlike in *Frans Maas (UK) Limited v Habib Bank AG Zurich [2001] Lloyds Reports Bank 14 at para [57] to [56]* where the guarantors obligations were to make payment where there had been "failure to pay" and instead the letter of demand referred to " failure to meet contractual obligations" which " latter concept" said the court "being wide enough to cover any claim for damages for unliquidated or unascertained sums arising from any branch of the WTA which would seem to me to widen the scope of the guarantee far beyond that which the parties intended" and unlike *Denel Soc Limited v ABSA Bank Limited and others [2013] 3 All SA 81 GSJ* where the guarantor was obliged to make payment on the condition that the third party not performed according to the "warranty obligations" and the demand referred to the "contractual obligations" which were, found, without discussion, to be non-compliant.

presentation with the demand constitutes, in these circumstances, compliance with the guarantee.

**Waiver**

40. Applicant relies upon the acceptance of the letter of demand, payment of R 6 million in respect of which repayment has not been demanded, and the late raising of this issue by respondents to argue that respondent has waived any right to void the letter demand required in the guarantee. Respondent replies that the R 6 million in payment was made in terms of the settlement agreement not the credit guarantee.

41. Waiver may be found where a party, who has an election between inconsistent alternative remedies, abandons or waives one of the alternatives by deciding on the other. In this case, applicant would have to show that respondent, with full knowledge of its legal position, by making part payment of R 6 million in terms of the guarantee acted inconsistently with enforcement of any right to claim non-compliance by applicant with the terms of the guarantee. The question for the court is whether or not respondent clearly showed the intention to surrender its right to dispute the demand (by reason of non-attachment of the cancellation) and therefore knowingly renounced its right to dispute the demand[15].

42. In all the correspondence to which I have referred there is no mention of or complaint by respondent of the failure to attach the letter of cancellation. Throughout this matter, respondent behaved and expressed itself as though the demand was good and compliant. This is because, submits respondent, respondent was acting in terms of and making payment in terms of a subsequent agreement which novated the agreement contained in the credit guarantee. However, I have found that there was no such agreement.

43. Indeed, when payment of the R 6 million was made, it was not made in terms of any proposals towards agreement – it was merely the amount which respondent's QS deemed appropriate – it was not an amount agreed upon by the parties. The payment was not made pursuant to the proposals of August.

44. Further, that payment R 6 million was thereafter stated "not made in full and final settlement of any particular heads of claim/components thereof. In the circumstances clause 7 of the guarantee remains of application relative to the amounts claimed." (5th December 2014) and that "the payment made also in a without prejudice context, and without admission of liability, as also entirely [without] prejudice to all our client's rights including its right in terms of clause 7 of

[15] See Kerr *The Principles of the Law on Contract* 6th Ed Kerr at pg 464-465.

the guarantee." (5th December 2014). Clearly, payment was made with the credit guarantee in mind as also clause 7 thereof. Clause 7 provides for deducting any earlier part payments from the guaranteed payment and for calculation of final amounts owing.[16](My underlining).

45. Respondent's payment is expressly stated to be subject to clause 7 of the credit guarantee. The payment is therefore made pursuant to and subject to that guarantee – and no other proposal or provisional agreement or part agreement. Respondent made payment of an amount determined by its QS and without input or negotiation or even prior knowledge by applicant.

46. In short, payment can only have been made by reason of the existence of the guarantee to which such payment was subject. Payment can only be made when there is a call or demand made in terms of clause 5 of that guarantee. Respondent did not, prior to making payment, claim that the demand was non-compliant with the terms of clause 5 of the guarantee and advert to the failure to attach the notice of cancellation thereto. Respondent made payment in terms of the guarantee and by referring to clause 7 of the guarantee explicitly acknowledged that payment was pursuant to clause 5 thereof.

47. I am satisfied that respondent has indeed waived the one alternative of insisting on compliance with the terms of clause 5 of the guarantee that the notice of cancellation (of 20th May) be attached to the demand (of 4th June) and instead decided to act in accordance with the other alternative of making part payment of R6 060 405.22 in terms of clauses 5 and 7 of the guarantee. Respondent has unilaterally abandoned the particular benefit which was intended to operate for its benefit - compliance in terms of clause 5 requiring the letter of cancellation to be attached to the letter of demand – by making part payment in terms of the guarantee.[17]

**CONCLUSION**

48. Firstly, I have been asked to find that there has been novation of the original guarantee. However, it has been impossible to establish the effect of such claimed novation. It is not argued that the original debt in terms of the guarantee of R 12

[16] Clause 7 reads: "Where the Guarantor is a registered insurer and has mad payment in terms of 5.0, the Employer shall upon the date of issue of the final payment certificate submit an expense account to the Guarantor showing how all monies received in terms of the Construction Guarantee have been expended and shall refund to the Guarantor any resulting surplus. All monies refunded to the Guarantor in terms of this Construction Guarantee shall bear interest at the prime overdraft rate of the Employer's bank compounded monthly and calculated from the date payment was made by the Guarantor to the Employer until the date of refund.."

[17] Van der Merwe above at pg 528. See also *Westmore v Crestanello* 1995 (2) SA 733 (W) .

million has been extinguished because respondent now argues that applicant must pursue respondent by way of summons in respect of the balance of the original R12 million. The disputed obligations of the guarantee are therefore still to be relied upon.

49. Secondly, I have found that the preliminary proposals to agree have no contractual force because there is clear evidence that both respondent and applicant appreciated that consensus on the outstanding issue of determination of the monies to be paid and the methodology of finalising same would have to be reached before a binding contract could be drafted and come into existence. Absent such agreement on any amount or methodology of determining same, the proposals are devoid of enforceability and insufficient to constitute a binding agreement.

50. Thirdly, I have found that the original guarantee agreement remains operative and was never novated because their expressed intentions, their conduct, the terms of the guarantee compared with the proposals, and all surrounding circumstances indicate no contractual force to the proposals and no novation of the guarantee.

51. Fourth, all writers and our courts [18] have cautioned that supervening proposals are presumed to be intended to strengthen and confirm existing rights rather than to constitute waiver thereof and substitution under a new contract. Our courts have been reluctant to imply novation in the absence of any express declaration thereof – except by way of necessary inference from all the circumstances which inference must not be lightly drawn. I am satisfied that, in the present case the invitations which were made were proposals intended to find a way to work through any difficulties in implementation of the guarantee and so to strengthen and enforce the guarantee rather than to extinguish it.

52. Fifth, I have found that respondent made an election (not by itself but with the full involvement of its legal representatives) to abandon any right in clause 5 of the guarantee to insist on a contemporaneous attachment of the cancellation to the demand and instead to pursue the alternative option of making part payment pursuant to that guarantee. Any payment at all by respondent could only have been in terms of the guarantee. Respondent had therefore chosen between living with and acting in accordance with the guarantee which required a valid demand before payment was required to made on the one hand and disputing the demand and so refusing to pay anything at all on the other hand. The two are inconsistent alternatives. Respondent could ‘say nay’ or ‘pay’. It chose to pay. It therefore waived it’s rights to challenge the compliance of the demand.

[18] From Pothier to Kerr and Christie. See also *Electric Process Engraving and Stereo Co v Irwin* 1940 AD 220.

53. Sixth, I have found that delivery of the letter of cancellation to respondent on 20th May, though prior to and not contemporaneous with the demand of 4th June, was compliance (though not 'strict' compliance) with the terms of clause 5 of the guarantee. I have found that, in the circumstances, this did not offend against the clear enunciation of the reasons given the supreme court of appeal for the need for existence of and presentation of the cancellation at the time of demand. The guarantor (respondent) was not required to go on an expedition to establish the truth of the averment in the demand that there had been cancellation – it had already received the notice of cancellation. The guarantor (respondent) was not asked to make enquiries as to the grounds given for cancellation – it already knew that the notice of cancellation claimed 'breach'. The guarantor/respondent was never under any illusions or doubts nor was it ever asked to go beyond its independent and autonomous contract with the beneficiary/applicant and make any enquiries of third parties. It had all the necessary information to hand – a valid notice of cancellation.

54. Respondent has already made payment of R6 060 405.22 (six million and 60 thousand four hundred and five rand and twenty two cents) under the guarantee. In terms of the guarantee, applicant can claim no more than the balance of the R12 438 671.61 (twelve million four hundred and thirty eight thousand six hundred and seventy one rand and sixty one cents) for which provision is made. That balance is 6 378 266, 39 (six million three hundred and seventy eight thousand two hundred and sixty six rand and thirty nine cents). The guarantee obviously allows for adjustments to be made once final figures are calculated.[19] I will therefore make an order for the balance as asked by applicant in the amount of R 6 378 266, 39 (six million three hundred and seventy eight thousand two hundred and sixty six rand and thirty nine cents)

**ORDER**

1. The respondent shall pay to the applicant the sum of R 6 378 266, 39 (six million three hundred and seventy eight thousand two hundred and sixty six rand and thirty nine cents);
2. The respondent shall pay interest at the legal rate of interest as follows:
    a. On the amount of R12 438 671.61 (twelve million four hundred and thirty eight thousand six hundred and seventy one rand and sixty one cents); and

[19] As provided for in clause 7.

b. On the amount of R 6 378 266, 39 (six million three hundred and seventy eight thousand two hundred and sixty six rand and thirty nine cents) to date of final payment.

3. The respondent shall pay the costs of this application including those costs of the unopposed motion of 23rd February 2015 when costs were reserved.

**DATED AT JOHANNESBURG 20th OCTOBER 2015**

**SATCHWELL J**

Counsel for Applicant: Adv Smalberger
Attorneys for Applicant: Werksmans Attorneys
Counsel for Respondent: Adv Dalrymple
Attorneys for Respondent: Edward Nathan Sonnenbergs Inc
Dates of hearing: 07TH October 2015
Date of judgment: 20th October 2015