REPUBLIC OF SOUTH AFRICA

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.

8/12/2015
DATE

SIGNATURE

CASE NO: **10995/2015**

In the matter between:

PHENIX CONSTRUCTION TECHNOLOGIES (PTY) LTD	First Applicant
QUITS AVIATION SERVICES LTD	Second Applicant
and	
HOLLARD INSURANCE COMPANY LIMITED	Respondent
and	
WORLD OF WINDOWS (PTY) LTD	First Third Party
WORLD OF WINDOWS PROJECTS (PTY) LTD	Second Third Party
ALUVISTA WINDOWS (PTY) LTD	Third Third Party
WORLD OF WINDOWS JOHANNESBURG (PTY) LTD	Fourth Third Party
TWO OCEANS GLASS AND ALUMINIUM (PTY) LTD	Fifth Third Party

WORLD OF WINDOWS EAST CAPE (PTY) LTD	Sixth Third Party
WORLD OF WINDOWS - KZN (PTY) LTD	Seventh Third Party
PEZULU FINISHING (PTY) LTD	Eighth Third Party
WINTIPTON INVESTMENTS (PTY) LTD	Ninth Third Party
ALUMINATE (PTY) LTD	Tenth Third Party
JENSING METALS (PTY) LTD	Eleventh Third Party
ALAN EDWIN GRAHAM REED	Twelfth Third Party
MICHAEL DUNCAN JOHN TREHEARN	Thirteenth Third Party
NTSIENI PRINCE MAPHUPHA	Fourteenth Third Party
MARTIN PEDDER	Fifteenth Third Party

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] The first applicant *('Phenix')*, seeks payment of R6 032 297.24 from the respondent ('*Hollard*'), based on a payment guarantee issued by Hollard on behalf of the first third party ('*World of Windows*'). It does so in its own right, alternatively on behalf of the second applicant ('*Quits*").

[2] The existence and terms of the payment guarantee are not in dispute between the parties, nor are the applicable legal principles. The difference between the parties lies in the application of these legal principles.

[3] This much is demonstrated by the fact that all the parties recognise that the existence of a fraud in demanding payment under the guarantee would excuse Hollard from making such payment but they are at odds over whether a fraud occurred. A dispute of fact looms.

[4] Phenix brought this application as the Employer in terms of a building contract, against Hollard, the Guarantor, for payment of a Guaranteed Advance Payment Sum being R6 032 297.24.

[5] Phenix filed a very short founding affidavit in which it claimed payment under the guarantee on the following basis:

5.1. On 19 February 2015 it gave notice to World of Windows (the subcontractor) of its default, and that Phenix was considering cancellation of the agreement between them if World of Windows remained in default for five working days after the date of receipt of the notice;

5.2. World of Windows had failed to remedy its default after receipt of the notice; and

5.3. On 27 February 2015 Phenix cancelled the agreement and made written demand of Hollard under the Guarantee.

[6] Hollard filed an answering affidavit and in addition invoked the procedure provided for in Rule 13(3)(a) and joined the third parties (fifteen of them) to the application pursuant to a notice to them. World of Windows was the first of the third parties joined. Hollard requested that the third parties pay to it the amount equal to any amount which it may be ordered to pay Phenix.

[7] Hollard's claim against World of Windows is premised on a Deed of Indemnity, and against the second to fifteenth third parties, on Deeds of Indemnity and Suretyship agreements. The existence of the Deeds of Indemnity and Suretyship agreements as well as the terms thereof, are not disputed.

[8] The only basis on which the third parties dispute their liability towards Hollard is that Hollard is not indebted to Phenix or Quits under the guarantee. The third parties' affidavits in particular that of World of Windows whose affidavit was deposed to by a certain Mr Reed, contain a wealth of factual information regarding the conduct of Phenix. In the event of this court finding in favour of Phenix or Quits, then Hollard should automatically be successful against the third parties.

[9] After the filing of the third parties' affidavits, Phenix filed a replying affidavit in which Mr Bhamjee, an employee of Phenix, contended that the issues raised by World of Windows was the subject of another dispute, beyond and unrelated to the guarantee and the obligations of Hollard in terms thereof.

[10] Hollard then filed a supplementary affidavit denying that it was necessary to file the affidavit as the facts were already before the court, but requesting specifically that certain facts advanced by Mr Reed, speaking on behalf of World of Windows, be incorporated and be dealt with as part of the evidence adduced by Hollard. Phenix responded to this. Although there were objections about receipt of the affidavits initially, at the time of the hearing, the court was requested to adjudicate the matter upon all the affidavits presented.

THE PAYMENT GUARANTEE

[11] The payment guarantee was issued by Hollard to secure an advance payment made to World of Windows by Phenix. The advance payment of R6 032 297.24 was made to World of Windows by Phenix in advance of it earning the payment as a form of cash flow assistance, as is common in contracts of this nature.

[12] The repayment or recoupment of an advance payment is effected by deducting amounts to the value of the work performed by World of Windows as the contract progresses and which, in the absence of the advance payment, would have been paid to World of Windows at the end of each month. The reason for the advance payment is to provide the contractor with cash flow sufficient to provide the working capital to do the work. The guarantee is issued to ensure that if the contractor does not do the work, the employer can recoup the monies advanced to the contractor.

[13] Clause 1.0 reads as follows:

The particulars of the recoupment of the Guarantee Advance Payment Sum are set out in the following schedule:

Recoupment period *(no. of months)*	4
Recoupment period commencement *(start month)*	October 2014
Monthly recoupment *(amount)*	R1,508,074-31

***Note**: Where the recoupment amounts and/or periods are irregular a schedule of recoupment amounts and dates is to be attached*

[14] Clause 4.0 reads as follows:

> "4.0 Subject to the Guarantor's maximum liability referred to in 1.0 the Guarantor undertakes to pay the Employer the Guaranteed Advance Payment Sum or the full outstanding balance upon receipt of a first written demand from the Employer to the Guarantor and the Guarantor's physical address calling up this Advance Payment Guarantee stating that:
>
> 4.1 The Agreement has been cancelled due to the Recipient's default and that the Advance payment Guarantee is called up in terms of 4.0. The demand shall enclose a copy of the notice of cancellation;"

[15] Thus, in terms of clause 1 of the payment guarantee, the recoupment would have occurred over a period of 4 months commencing in October 2014 and ending in January 2015. The monthly repayment amount was stipulated as R1 508 074.31, and

on the express terms of the guarantee, nothing would be claimable in February 2015. Phenix demanded payment of the full amount on 27 February 2015.

THE LEGAL POSITION

[16] The legal position, which was not disputed and which is to be applied to the facts, is succinctly summarised in the following authorities:

In *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd*, [2014] 1 All SA 307 (SCA), Theron JA held as follows:

"[28] Our courts, in a long line of cases and also relying on English authorities, have strictly applied the principle that a bank faced with a valid demand in respect of a performance guarantee, is obliged to pay the beneficiary without investigation of the contractual position between the 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. This court in Loomcraft referred to the fact that the autonomous nature of the obligation owed by the bank to the beneficiary under a letter of credit 'has been stressed by courts both in South Africa and overseas'. The learned judge referred to a number of authorities, both local and English to illustrate this point. Similarly, this court in Lombard Insurance, confirmed that the obligation on the part of the bank to make payment on a performance guarantee is independent of the underlying contract and whatever disputes may arise between the buyer and the seller are irrelevant as far as the bank's obligation is concerned.

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

[17] The existence of a fraud in demanding payment under a guarantee would excuse a Guarantor from making payment in terms thereof. In respect of the fraud exception, Theron JA extrapolates the following principles :

> ["17] It would be useful to briefly consider the legal position in relation to the fraud exception. It is trite that where a beneficiary who makes a call on a guarantee does so with knowledge that it is not entitled to payment, our courts will step in to protect the bank and decline enforcement of the guarantee in question. This fraud exception falls within a narrow compass and applies where:
> ' ... the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his (the seller's) knowledge are untrue.' "

DEMAND IN TERMS OF THE GUARANTEE

[18] World of Windows argued that the guarantee was furnished to the employer defined as "*Phenix Construction Technologies (Pty) Ltd on behalf of Quits Aviation Services*". The advance payment of R6 032 297.24 was made by Quits. The demand upon which the applicants rely, was not made by Quits, but by Phenix. When making demand, so the argument ran, it was made not on behalf of Quits, and in addition, it demanded payment into its own bank account. In *Loomcraft Fabrics CC v Nedbank and Another*, 1996 (1) SA 812 (A) at 815I, Scott AJA held: "*The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit* ". In this matter, clause 4 of the guarantee obliges Hollard to pay Quits and no demand by Quits had been made.

[19] This point was not raised by Hollard. It is clear that Hollard understood and dealt with the guarantee as though Phenix were the party entitled to call up the guarantee. I take it no further.

THE FRAUD

[20] World of Windows avers that "*the full Guaranteed Advance Payment Sum cannot be claimed* " because it alleges that the demand was fraudulent insofar as Phenix knew that the full amount could not be claimed and/or because Phenix knew that the cancellation of the building contract had actually been effected by World of Windows.

The demand for the full amount

[21] World of Windows annexed a copy of a payment advice which was issued by Phenix on 27 January 2015 ('*the payment advice*'). It also referred to a related subcontractor's recovery statement, prepared by Phenix and also dated 27 January 2015 ('*the recovery statement*'). In terms of these two documents, Phenix certified that the amount of R3 400 000 was due and payable to World of Windows. The payment advice reflects that Phenix certified that it was a '*recoupment of advance payment*'. It reflects further that at that time there were materials on site in excess of the valuation of R 2.4 million and materials off site in excess of the valuation of R 1 million. The correctness of all these facts reflected in both the payment advice and the recovery statement, were confirmed to be correct by Mr Reed. He explained further that the amount of R 3.4 million had not been paid to World of Windows and could, therefor, only be a recoupment of the sum referred to in the guarantee.

[22] Mr Reed then contended: *'In the result, Phenix fraudulently made demand in terms of the guarantee knowing full well that their demand contained a material*

misrepresentation of fact, which Phenix knew was untrue and which was advanced in bad faith, in that Phenix knew that there was no basis upon which it could demand payment of the amount of R6 032 297.24 in terms of the guarantee, yet this is precisely what it did.'

[23] In response to that assertion, Mr Bhamjee (Phenix's employee) did not address his state of mind or how he understood the payment advice (assuming for the moment that his state of mind is relevant). Instead, he contented himself with an explanation of the payment advance. Mr Bhamjee explained that during the execution of the contract, the applicants had issued World of Windows with eight variations to the works, that the recoupment of R3.4 million concerned the variation orders and in any event, that the payment advice had been wrongly issued.

[24] The general rule in regard to the approach to disputes of fact in motion proceedings as set out in the *Plascon-Evans* matter applies,[1] even though the onus of establishing the fraud is on Hollard.[2] Thus, the existence of the fraud must be determined on Hollard's version.

[25] Hollard argued that contrary to what Mr Bhamjee stated, the payment advice did not concern the variations because the payment advice related to materials on and off site. The variation orders concerned, so the argument ran, amongst other things, a change from bead glazing to flush glazing and "*Preliminaries & Generals*" arising from a change in the scope of work to be performed. The fact that the variation orders were for work performed and not for materials, was apparent from the unit rate of work. For example, in variation order 3, it was stated that 9.97m2 of flush glazing was added. Hollard contended that no-one delivered such precise lengths of material

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1 Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H-635C

2 Ngqumba v Staatspresident 1988 (4) SA 224 (A) at 258H-262H

to site. The applicants argued that the contentions, with reference to the variations, were patently wrong and speculative. Variation order 3 dealt with a price per square meter for windows removed and a price per square meter for windows replaced. It was argued that the rates were not for labour but for material.

[26] According to Mr Bhamjee, World of Windows was obligated to furnish guarantees for the advance payments that were made in respect of the variations. Hollard countered that there was nothing in writing to confirm such an agreement. Indeed, so the argument ran, the applicants' conduct was at odds with such an agreement as the payments which were made, were made without any guarantee in place. In its reply, the applicants referred to a letter, dated 18 December 2014, which called for an additional guarantee. There is, however, no explanation proffered for why payments were made, despite the absence of guarantees. Furthermore, the amount of R1 406 912.19 was not paid in respect of variation order 8. Accordingly, no "*recoupment*" could arise in relation to this amount in any circumstances.

[27] It was also argued by the respondent that in order to sustain the denial of the fraud, Mr Bhamjee was driven to dispute the truth of Phenix's own document, the payment advice. This, as was pointed out by World of Windows, was because no advance payment was made in relation to the variation orders and the recoupment of R 3.4m as alleged by Phenix was wrong on Phenix's own version. Since Phenix was the engineer, contractor and agent of Quits, it was obliged to raise a dispute with itself over the veracity of the payment advice in order to sustain its denial that the demand was fraudulent. The applicants explained that the subsequent dispute about the true value of the material constituted an additional explanation as to why the exposure of the applicants, protected by the guarantee, justifiably resulted in a

situation that the full guarantee sum was still available to the applicants. Mr Bhamjee recognised that the recoupment in respect of material, proved to be wrong due to the conduct of World of Windows, leading him to the understanding that no recoupment was justified to begin with, less so a recoupment against the guarantee. I find this explanation unpersuasive. Mr Bhamjee is not the author of either the payment advice or the recovery statement. He can accordingly not speak to the document. That aside, these two versions ie that the recoupment related to a variation on the one hand, and on the other that it is a mistake, needs to be explained.

[28] As indicated, this feature is particularly unsatisfactory if regard is had the following extract, being the affidavit deposed to by Mr Reed (on behalf of World of Windows): *"I deny that Mr Bhamjee has knowledge of the material facts. Mr Bhamjee states no more than that he is employed by Phenix and he is not even a director of Phenix. I never dealt with Mr Bhamjee. I and the First Third Party dealt with Mr Marais, the director of Phenix, who is also the person who signed the Payment Advice and Recovery Statement, annexures "TP3" and "TP4" hereto. Furthermore, and save for admissions made herein, I deny that the facts contained in his affidavit are true and correct. In particular, I deny that the Applicants had any lawful basis to demand payment of the amount of R6 032 297.24 from the Respondent in terms of the guarantee – and they knew this"*

[29] Thus, both the recovery statement and the payment advice, were signed by Mr Marais, the director of Phenix, and not Mr Bhamjee.

[30] These allegations stand undisputed as the applicant's initially, erroneously, adopted the view that the court was precluded from having regard to the affidavit of a third party to determine the dispute between the applicant and the respondent. No

replying affidavit, to the entire affidavit filed on behalf of the third parties, was filed. In addition, and in any event, I have been requested to adjudicate this matter on all the affidavits before me.

[31] In the recovery statement Mr Marais expressly reflected the R3.4 million as being "*Recoupment of Advance Payment*". The reference to an "*advance payment*" which could be "*recouped*" is probably a reference to the "*recoupment*" specifically dealt with in the guarantee. This recovery statement is expressly referred to in the payment advice, and itself also expressly describes the R3.4 million as being an *'Advance Payment Recoupment'*.

[32] Mr Bhamjee's evidence in respect of the interpretation of the content of the payment advice and the recovery statement, is inadmissible as the document should speak for itself or Mr Marais should speak to it. It certainly cannot serve to contradict the allegations made by Mr Reed in his affidavit or the payment advice and the recovery statement. There is no evidence before court as to what Mr Marais thought. He drafted the payment advice and the recovery statement. One would've expected an affidavit from him dealing with what he did and intended to do. Although a confirmatory affidavit was filed on behalf of Mr Marais, it reads '*I confirm the contents thereof insofar as it relates to me and insofar as reference is made to my involvement in the matter*'. Mr Bhamjee does not refer to Mr Marais in relation to the recoupment statement or the payment advice. Most of what Mr Bhamjee says in respect of the fraud, is his interpretation of matters he has no personal knowledge of.

[33] It is only if this court were to conclude that the defence of fraud raised by Hollard and World of Windows, does not raise a real, genuine or bona fide dispute of fact, that the final relief sought by the applicants can be granted. There is no basis

upon which World of Window's defence can be rejected on the affidavits. Indeed, Hollard and World of Windows argued that the difficulties mentioned herein before entitled the court to reject Phenix's version of the fraud, on paper. The arguments advance by Hollard and World of Windows in adopting this approach were compelling but what weighed very heavily with this court in coming to the conclusion that the matter should be referred to the hearing of oral evidence on this aspect was, in addition to the aspects referred to herein before, the following: According to Mr Reed, recoupment had occurred regardless of and prior to the payment advice, as a natural application of the terms of the guarantee. If that is so, then the R3 400 000, on his version (the version adopted by Hollard and advanced by World of Windows) might not have related to the guarantee. Even though Mr Bhamjee can not speak to all the facts underpinning the fraud and his denial or understanding can take the matter no further, I find there is sufficient before me to conclude that there is a genuine dispute which is incapable of resolution on the papers.

The demand in the face of the disputed cancellation

[34] The applicants rely on clauses 4.0 and 4.1 of the guarantee to demand payment of the amount of R6 032 297.24 on the grounds that the agreement between Quits and World of Windows has been cancelled by it. Hollard contended that Phenix had failed to disclose when making its demand that World of Windows had already cancelled the agreement on 26 February 2015 in accordance with its attorney's letter dated 24 February 2015. Thus it was no longer open to Phenix to cancel the agreement on 27 February 2105 as it had already been cancelled. Phenix's response to this was that at the time of the purported termination by World of Windows, there were no grounds that entitled World of Windows to terminate and the purported

termination was unlawful, ineffective and amounted to no more than a repudiation of the agreement. The applicants had notified World of Windows of its defaults on 5 February 2015, and on 19 February 2015 notified it of its intention to terminate the contract in the event that World of Windows remained in default. This default entitled the applicants to terminate the contract which they did on 27 February 2015.

[35] The evidence before court demonstrates that Phenix held the view that, in respect of this cancellation issue, it was entitled to lawfully pursue its claim under the guarantee. The mere fact that it pressed its claim knowing that World of Windows held a contrary view about cancellation with which it disagreed, is not fraudulent. Phenix did not have to prove that it was entitled to cancel as a precondition to the enforcement of the guarantee, all it was required to do was to allege it. *See FirstRand Bank Ltd v Brera Investments CC*, 2013 (5) SA 556 (SCA) at para 10. I find that this issue is not an issue which relates to a fraud in respect of the demand at the centre of this dispute. I make this ruling, mindful of the fact that this finding cannot bind a subsequent court hearing the evidence in respect of the question I propose referring to the hearing of oral evidence (see *Wallach v Lew Geffen Estates CC 1993 (3) SA 258 (AD) (supra*), Milne JA at 262J).

CONCLUSION

[36] I accordingly grant the following order:

36.1. The matter is referred for the hearing of oral evidence at a time to be arranged with the Registrar, on the question whether or not the demand for payment in terms of the guarantee was made fraudulently by demanding payment for the full outstanding sum.

36.2. The evidence shall be that of any witnesses whom the parties elect to call, subject, however, to what is provided in para. 36.3 hereof.

36.3. Save in the case of Mr. Bhamjee, Mr Lavery and Mr. Reed, no party shall be entitled to call any witness unless:

36.3.1. it has served on the other party at least 14 days before the date appointed for the hearing (in the case of a witness to be called by Hollard and any third party) and at least 10 days before such date (in the case of a witness to be called by the applicants), a statement wherein the evidence to be given in chief by such person is set out; or

36.3.2. the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

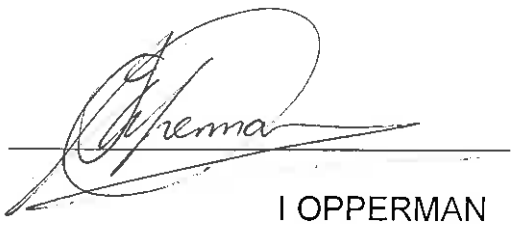
36.4. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

36.5. The fact that a party has served a statement in terms of para. 36.3 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

36.6. Within 21 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issue referred to in para. 36.1 hereof, which are or have at any time been in the possession or under the control of such party.

36.7. Such discovery shall be made in accordance with Rule of Court 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

36.8. The incidence of the costs incurred up to now shall be determined after the hearing of oral evidence.



I OPPERMAN
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 22 October 2015
Judgment delivered: 10 December 2015
Appearances:
For Applicant: Adv Lucas J van Tonder SC
Instructed by: Tiefenthaler Attorneys

For Respondent: Adv C McAslin
Adv C Humphries
Instructed by: Frese, Moll and Partners

For 1 – 15 Third Parties : Adv RWF MacWilliam SC
Instructed by: Smith Tabata Buchanan Boyes Attorneys

Summary – Demand in terms of a payment guarantee – Legal principles not in dispute – Application of legal principles in dispute – Fraud in demanding payment would excuse Guarantor – Fraud alleged in respect of the demand both in respect of the amount claimed and that subcontractor had already cancelled the underlying agreement – Fraud in respect of the amount claimed disputed and referred to oral evidence – Fraud in respect of the cancellation – no dispute on papers or if dispute exists, such dispute relates to underlying agreement and not to demand.