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

Case No: 100/2015

In the matter between:

UNIVERSITY OF THE WESTERN CAPE Applicant

and

ABSA INSURANCE COMPANY LTD Respondent

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

23/10/15

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JUDGMENT

D S FOURIE, J:

(1) The applicant seeks judgment against the respondent for payment of R13,128,265.71 in terms of a construction guarantee issued by the respondent in its favour. The guarantee was issued on 29 February 2012 as security for the performance of a building contract in respect of the construction of certain building works on the property of the applicant. The guarantee itself was of the variable kind – the initial value was R21,880,442.85 which would later reduce to R13,128,265.71. The quantum of the claim in the amount of R13,128,265.71 is not in dispute. The defence

raised by the respondent is twofold: first, the applicant failed to comply with the terms of the guarantee in making its demand and secondly, the applicant's conduct in making the demand was tainted by impropriety. The other defences raised on the papers have been abandoned.

BACKGROUND

(2) It has been alleged by the applicant that the building contractor commenced work on the project and achieved so-called "practical completion" of the works on or about 6 March 2014, but thereafter failed to achieve works completion or any of the further stages contemplated in the building contract. As a result of the contractor's alleged non-performance, the applicant cancelled the building contract on 30 May 2014 and simultaneously advised the contractor that it intended to call up the construction guarantee.

(3) On or about 2 June 2014 the applicant, via the principal agent LMC Project Management, delivered a letter to the respondent at its address as stipulated in the guarantee in terms of which it recorded that it had cancelled the building contract and demanded payment in terms of clause 5.1 of the guarantee. The letter had annexed to it a copy of the guarantee and a copy of the notice of cancellation.

(4) It has been contended by the respondent that the applicant failed to comply with the terms of the guarantee in making its demand, because the

principal agent (LMC Project Management) made the demand and not the employer (the applicant) as stipulated in the guarantee. Furthermore, it has also been alleged that the calling up of the guarantee was contrived, as the statement that the agreement had been terminated due to the contractor's default, was not made in good faith. According to the respondent (relying on an allegation by the contractor) the applicant's demand was made knowing that the contractor had not been in default, but was nonetheless made "in order to satisfy outwardly the requirements of the guarantee".

THE GUARANTEE

(5) In terms of the guarantee the "employer" means the University of the Western Cape, the "contractor" means CF Projects Cape (Pty) Ltd t/a Filcon Projects and the principal agent is LMC Consulting (a reference to LMC Project Management). Clause 5 thereof reads as follows:

> *"Subject to the Guarantor's maximum liability ... 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 Guarantor's physical address calling up this Construction Guarantee 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 ..."

(6) Clause 8 provides that payment shall be made within 7 (seven) calendar days upon receipt of the first written demand. In terms of a note on the last page of the guarantee it has been stipulated that:

> *"In the event of a call on this Guarantee, Payment will only be made against return of this original Guarantee by the Employer or the Employer's duly authorised agent."*

DISCUSSION

(7) It was contended on behalf of the respondent that, as in the case of letters of credit, strict compliance is also necessary for performance guarantees. Reference was made, *inter alia*, to Compass Insurance Ltd v Hospitality Hotel Developments (Pty) Ltd 2012 (2) SA 537 (SCA) at par 13 where the following was said:

> *"In my view it is not necessary to decide whether strict compliance is necessary for performance guarantees, since in this case the requirements to be met by (the respondent) in making demand were absolutely clear, and there was in fact no compliance, let alone strict compliance. The guarantee expressly*

required that the order of liquidation be attached to the demand. It was not."

(8) Relying on this principle it was pointed out that in terms of clause 5 of the guarantee the first written demand must be made by the employer, whereas in this case it had been made by the principal agent. Therefore, so it was argued, the applicant did not strictly comply with the terms of the guarantee.

(9) A copy of the first letter of demand is attached to the founding affidavit. It has been written on the letterhead of the principal agent and has been signed by a representative of the principal agent. The last paragraph thereof reads as follows:

"The University of the Western Cape (Employer) herewith notifies the Guarantor that the Principal Building Agreement with Filcon Projects has been terminated due to the Contractor's default and the Construction Guarantee is called up in terms of Clause 5.1 of the Guarantee."

(10) It is clear from this paragraph that the principal agent was acting, not in its own name, but as the representative of the applicant and that this letter was intended to be a first written demand on its behalf. It appears to be common cause (or at least, it is not in dispute) that the principal agent was indeed acting on behalf of the applicant when this letter was written (par 23 of the founding affidavit and par 41 of the answering affidavit). The issue is

therefore whether performance by a representative can be regarded as strict compliance with the terms of the guarantee.

(11) Representation or agency is not only a well-known legal notion, but is also generally accepted by the business community and applied in the commercial world. Usually it can be applied in relation to any lawful act which the principal himself can perform. Such acts, when properly performed, are *ipso iure* the acts of the principal, i.e. they accrue to him for his benefit or to render him liable, as the case may be, without any benefit or liability attaching to the agent (cf Blower v Van Noorden, 1909 T.S. 890 at 899 and Wille's Principles of South African Law, 9 Ed p 984). However, there are, as usual, a few exceptions, for instance where the law requires performance by a specified person (Potchefstroom Stadsraad v Kotze 1960 (3) SA 616 (A)); where performance is of such a personal nature that it can be inferred the other party would require and be entitled to personal performance; and when performance by an agent or representative is by agreement excluded, either expressly or by necessary implication (cf Christie's *Law of Contract in South Africa*, 6 Ed p 422 and Kerr, *The Principles of the Law of Contract*, 6 Ed, p 520).

(12) When these general principles are applied to the guarantee in question it appears that performance by the employer as stipulated in clause 5 is not of such a personal nature that the guarantor may insist on personal performance. On the contrary, this guarantee appears to be part of a normal business transaction between the applicant as employer and the

respondent as guarantor. There is also no indication, neither has it been argued, that representation by an agent acting on behalf of the employer in this case is prohibited by law or that a specific person has been designated. Finally, there is no term or condition in the guarantee which explicitly excludes performance by a representative or an agent on behalf of the employer. I am also unable to find that such a term or condition should be inferred by necessary implication. There is no indication in the wording or otherwise that it was so intended by the parties. The note at the end of the guarantee referring to the "Employer's duly authorised agent" relates to the return of the original guarantee before payment will be made. The intention was, so it appears to me, to ensure the return of the original guarantee before any payment will be made and not to authorise representation only in this instance. Having regard to all these considerations, I am of the view that in this case the act of representation should be regarded as the act of the principal as if it had been performed by the principal itself. I therefore conclude that there is no merit in the defence relating to representation.

(13) This brings me to the second defence, the alleged impropriety. It appears from the answering affidavit that this defence has two components. The first relates to a dispute with regard to the issuing of a practical completion certificate and the second that the cancellation by the applicant was not only unlawful, but also contrived. Relative to these allegations, it has further been alleged that if the practical completion certificate had not been issued, then the applicant's statement that the contract was terminated due to

the contractor's default was made in order to satisfy outwardly the requirements of the guarantee. On the other hand, if the practical completion certificate had indeed been issued, the question then is whether the applicant's cancellation can be considered to have followed upon a default on the part of the contractor (par 14 of the answering affidavit).

(14) These allegations are being disputed in the replying affidavit. With reference to an e-mail from the contractor (Filcon) dated 17 April 2014 requesting a practical completion certificate, it is alleged that such a certificate was issued to the contractor under cover of an e-mail from the principal agent to the contractor. A copy of both e-mails is attached to the replying affidavit as annexure "AR9". This indicates that in answer to the request for a certificate, an e-mail was sent to the contractor on 17 April 2014 stating "see the attached PC certificate". A copy of the certificate has also been attached. It indicates that practical completion was achieved on the 7th of March 2014 and that it (the certificate) was confirmed by the employer (the applicant) on 17 April 2014.

(15) According to the objective evidence it appears that the certificate was not only in existence on 17 April 2014, but that it was also confirmed by the employer (the applicant) on that date. If it was in existence and confirmed by the employer on that date, why would the principal agent not have provided it to the contractor when being requested to do so? As a matter of fact the evidence clearly indicates that it was made available as an attachment to an e-mail which was sent to the contractor on 17 April 2014.

The only answer by the contractor is that he did not receive it. Even if I have to accept this answer (which appears to be doubtful, to say the least), there is no allegation to even suggest that the certificate or the e-mail referring thereto, is a falsification. I therefore have to accept, on the evidence before me, that such a certificate was indeed forwarded to the contractor on 17 April 2014.

(16) I shall now consider the second leg of the defence, i.e. that the cancellation by the applicant was not only unlawful, but also contrived. Is it competent for the respondent to dispute the validity or lawfulness of the cancellation by the applicant? In Dormell Properties 282 CC v Renasa Insurance Co Ltd 2011 (1) SA 70 (SCA) it was considered on appeal whether or not D was entitled to persist in claiming payment of a guarantee notwithstanding the fact that it had subsequently been found during an arbitration that it had not been entitled to cancel the contract. It was held, in the majority judgment, that D had lost the right to enforce the guarantee and that there remained no legitimate purpose to honour the guarantee in such circumstances. However, writing for the minority, Cloete JA said the following in this regard (par 63):

> *"The appellant complied with the provisions of clause 5. It was not necessary for the appellant to allege that it had validly cancelled the building contract due to the second respondent's default. Whatever disputes there were or might have been between the appellant and the second respondent were irrelevant to the first respondent's obligation to perform in terms of the construction*

guarantee. ... Put more accurately, a valid demand on the construction guarantee can only be defeated by proof of fraud. In the present matter there was a valid demand. There was no suggestion of fraud."

(17) In FirstRand Bank Ltd v Brera Investments CC 2013 (5) SA 556 (SCA) the Supreme Court of Appeal had the opportunity to reconsider the majority judgment in Dormell. It was then concluded that "the better approach" is that of Cloete JA (par 10). Also in Guardrisk Insurance Co Ltd v Kentz (Pty) Ltd [2014] 1 All SA 307 (SCA) the majority judgment in Dormell was criticised. Theron JA concluded that the reasoning of the majority in Dormell is flawed and that the better approach is that of the minority (par 25 and par 26).

(18) Having regard to these authorities, I am satisfied that it was not even necessary for the applicant to allege that it had validly cancelled the building contract due to the contractor's default. Put differently, a dispute with regard to the question whether or not the applicant was entitled to cancel the contract is irrelevant and does not entitle the respondent to raise it as a defence. The only defence would be to allege and prove that the applicant committed fraud in this regard. No doubt, the party alleging fraud bears the onus to prove it.

(19) It has been alleged that the cancellation was contrived, suggesting that the applicant made the call on the guarantee knowing that the contract had not in fact been cancelled on account of the contractor's default.

However, it has been explained by the applicant in the founding affidavit (par 15-17) that, although the building contractor had commenced work on the project and achieved so-called "practical completion" on or about 6 March 2014, it thereafter failed to achieve works completion or any of the further stages contemplated in the building contract. According to the applicant the so-called "Works Completion" should have been achieved by 19 April 2014. These allegations appear to be corroborated by the principal agent in its letter dated 2 June 2014 (annexure "AR6") addressed to the respondent, in which it is also stated that the building contractor "did not proceed continuously, industriously and with due skill and the appropriate physical resources to bring the works to Works Completion". Furthermore, a copy of the notice of cancellation dated 30 May 2014 (annexure "AR2") is attached to the founding affidavit stating that the building agreement "is now terminated" and that the applicant "will now call up the construction guarantee".

(20) It has been admitted by the respondent that the applicant "purported to cancel the building contract on 30 May 2014". However, it is denied that the building contractor failed to proceed diligently with any of the works and it is contended that the applicant sought to take advantage of its own breach of contract to derive a benefit in terms of the guarantee. It was then argued that if the practical completion certificate was never sent to the building contractor, then the applicant was not entitled to cancel the building contract and unless rebutted, it should be obvious that the applicant made and relied on a false statement of termination.

(21) I cannot agree with this submission for the following reasons: First, I have already concluded that, on the evidence before me, the practical completion certificate was indeed forwarded to the contractor on 17 April 2014. Second, there is evidence before me, confirmed by the principal agent in its letter dated 2 June 2014, that the building contractor had failed to proceed diligently with the remaining work as a result whereof the building contract was terminated on 30 May 2014. There is also a copy of the notice of cancellation which was attached to the letter calling up the guarantee. Third, the respondent's failure to adduce evidence of fraud, as opposed to a mere allegation or opinion in this regard, or seeking an inference to be drawn, is in my view fatal to this defence. It is not sufficient to say the contractor holds the view that the call was made in bad faith as this may probably only indicate the existence of a dispute between the applicant and the building contractor with regard to the question whether or not the applicant was entitled to cancel the contract. Finally, fraud will have to be clearly established. It will not lightly be inferred, particularly when it is sought to be established in motion proceedings (Loomcraft Fabrics CC v Nedbank Ltd 1996 (1) SA 812 (AD) at 817G and 822H-I). Having regard to the evidence and these considerations, I am unpersuaded that on the papers the respondent succeeded in discharging the onus of proving fraud. As a matter of fact, in my view, the evidence points to the opposite. It follows that the application should succeed.

ORDER

In the result, I grant the following order:

(1) The respondent is liable to the applicant for payment of R13,128,265.71 (thirteen million one hundred and twenty eight thousand two hundred and sixty five rand and seventy one cents);

(2) The respondent shall pay interest on the said amount calculated at the prescribed rate *a tempore morae*;

(3) The respondent shall pay the costs of this application, which costs shall include the costs of two counsel.

D S FOURIE
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date: 28 October 2015