REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **2015 / 17231**

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

....
SIGNATURE **DATE**

In the matter between:

HOLLARD INSURANCE CO. LTD **Applicant**

And

JEANY INDUSTRIAL HOLDINGS (PTY) LTD **1st Respondent**

SPARE PARTS PROPERTIES (PTY) LTD **2nd Respondent**

KEYWORD INVESTMENTS (PTY) LTD **3rd Respondent**

DON CAPITAL (PTY) LTD **4th Respondent**

PETROL ENGINEERING (PTY) LTD **5th Respondent**

SPARE PARTS MANUFACTURING (PTY) LTD **6th Respondent**

LEE SPENCE DONJEANY **7th Respondent**

VINCENT CHETTY **8th Respondent**

IAN LAVERNE DONJEANY **9th Respondent**

JUDGMENT

MASHILE J

[1] For purposes of convenience, the words hereunder shall be referred to as follows:

1.1 The 'reciprocal indemnity and suretyship agreements' - The indemnity;

1.2 Elgin Engineering (Pty) Ltd - Elgin;

1.3 The Second, Third and Fourth Respondents - Indemnity Respondents;

1.4 The Seventh and Ninth Respondents – The sureties;

1.5 Demand performance guarantee - Guarantee;

1.6 Sunrise Energy (Pty) Ltd - Sunrise;

1.7 Contract between Elgin and Sunrise - The contract.

[2] Following the conclusion of the indemnity in favour of the Applicant on 20 September 2013 by Elgin and the indemnity Respondents, which was at the instance and request of Elgin, the Applicant issued

a guarantee on 7 October 2013 in favour of Sunrise, for the obligations of, and on behalf of, Elgin under the contract.

[3] On 20 November 2013, the sureties executed a suretyship in favour of the Applicant in terms whereof they intervened, binding themselves as sureties and co-principal debtors, jointly and severally, the one paying the others to be absolved, with Elgin and the indemnity Respondents, for the due payment by any of them to the Applicant of all amounts which they may be liable to pay to the Applicant under the indemnity and for any claims, losses, liabilities, costs and expenses which the Applicant may sustain as a consequence of having executed a guarantee on behalf of Elgin and the indemnity respondents.

[4] Elgin has failed to perform in terms of the contract that it had concluded with Sunrise, eliciting Sunrise to issue a demand calling upon the Applicant to pay as contemplated in the guarantee. The Applicant, as it was obliged to do, honoured the demand by settling the amount demanded. The Applicant has in turn demanded payment of what it had paid to Sunrise plus interest and other ancillary amounts. The Respondents have persistently refused to pay as per the demand of the Applicant.

[5] Against that backdrop, the Applicant launched this application seeking relief against all the Respondents jointly and severally, the one paying the others to be absolved for:

5.1 Payment of the amount of R33 951 466.00;

5.2 Interest on the above amount at a rate equal to the prime overdraft rate of ABSA Bank Ltd plus 2% being 11.25% from 31 March 2013 to date of final payment;

5.3 Costs of suit on the scale as between attorney and client.

[6] The above relief sought by the Applicant is now only against the Second, Third, Fourth, Seventh and Ninth Respondents. The Applicant cannot persist with the relief against the remaining respondents because the Fifth and Sixth Respondents have since been placed under business rescue while it has made an arrangement with the eighth Respondent. Elgin too could not be sued because it, like the Fifth and the Sixth Respondents, is under business rescue.

[7] The application owes its genesis to the following factual background:

7.1 The indemnity to which I have alluded above, which was executed by the indemnity Respondents in favour of the Applicant on 20 September 2013 provides that the indemnity Respondents:

7.1.1 Undertook to indemnify the Applicant and hold it harmless against all claims, losses, payments, liabilities, costs and expenses which the Applicant may incur by reason of having executed a guarantee on behalf of Elgin and the indemnity Respondents;

7.1.2 Undertook and agreed to pay the Applicant, on demand, any sums of money which it may be called upon to pay under any guarantee issued for and on behalf of Elgin (and the indemnity Respondents) whether or not the particular respondent, on whose behalf the applicant has furnished a guarantee, admits the validity of such claims under such guarantee;

7.1.3 Bound themselves as surety and co-principal debtors, jointly and severally in *solidum* with any respondent on whose behalf the Applicant has furnished a guarantee for the due payment by that respondent to the applicant on demand of any amount which that respondent is liable to pay the Applicant under the indemnity;

7.1.4 Agreed that their liability to the Applicant, in terms of the indemnity, is unlimited and any certificate of such liability shall be prima facie evidence of the amount owing;

7.1.5 Agreed that the obligations of Elgin and the indemnity Respondents shall continue and remain in force as continuing covering security until such time as the Applicant has been entirely and finally released from its obligations, contingent or otherwise, under all guarantees issued on their behalf;

7.1.6 Expressly consented to the jurisdiction of this Court.

[8] The suretyship that was concluded by the sureties in favour of the Applicant on 20 November 2013 Provides that the sureties:

8.1 Interposed and bound themselves as sureties and co-principal debtors, jointly and severally with Elgin and the indemnity Respondents, for the due payment by any of them to the Applicant

of all amounts which they may be liable to pay to the Applicant under the indemnity and for any claims, losses, liabilities, costs and expenses which the Applicant may sustain as a consequence of having executed a guarantee on behalf of Elgin and the indemnity Respondents;

8.2 Undertook and agreed to pay the Applicant, on demand, any sums of money which the Applicant may be called upon to pay under any guarantee issued on behalf of Elgin and the indemnity Respondents whether or not the particular surety admits the validity of such claims under such guarantee;

8.3 Renounced the legal exceptions or benefits of excussion, division, cession of action, *non causa debiti* and no value received;

8.4 Agreed that their liability under the surety shall continue to remain in force as an unlimited continuing covering security until such time as Elgin and/or the indemnity Respondents have been entirely and finally released from their obligations, contingent or otherwise, to the Applicant.

[9] On 7 October 2013, The Applicant issued a guarantee in favour of Sunrise at the instance and request of Elgin, for the obligations of, and on behalf of, Elgin under the contract. That guarantee was issued subsequent to the indemnity Respondents concluding the indemnity in favour of the Applicant on 20 September 2013.

[10] In terms of the guarantee, the Applicant undertook to pay to Sunrise on the first written demand of Sunrise, an amount not exceeding R33 951 466.00, upon receipt of a written demand and a certificate executed by Sunrise's representative certifying that Elgin

is in breach of its obligations under the contract (and giving details thereof).

[11] It is not disputed that Sunrise prepared a written demand for payment and forwarded it to the Applicant. The Applicant received the demand on 20 February 2015. The demand was accompanied by the original guarantee and a certificate (hereinafter "the certificate") executed by a Sunrise representative. The certificate confirmed that Elgin was in breach of the contract and gave details of the breach thereby demanding payment from the Applicant in the amount of R33 951 466.00 in terms of the guarantee.

[12] On 5 March 2015, the Applicant in turn delivered written demands for payment to the indemnity respondents and the sureties thereby demanding payment of the amount with interest and costs, which amount it was obliged to pay to Sunrise under the guarantee. In observance of its obligations under the guarantee, the Applicant made payment to Sunrise of the amount of R33 951 466.00 in four payments during the period of 17 and 31 March 2015 in accordance with the terms of the guarantee. The indemnity respondents and the sureties have until now refused to repay the amounts paid by the Applicant to Sunrise under the guarantee.

[13] On the basis of the above facts, which are largely common cause, this Court is called upon to determine whether or not the indemnity Respondents and the sureties are liable to the Applicant jointly and severally, the one paying the others to be absolved, in the amount of R33 951 466.00 plus interest and costs being what it paid to

Sunrise in terms of the guarantee. The respondents justify their refusal to pay on the grounds that:

13.1 This Court lacks jurisdiction to hear the matter notwithstanding the consent to jurisdiction by both the indemnity Respondents and the sureties;

13.2 The authority upon which the deponent to the founding affidavit relies is limited to claims in respect of business rescue, liquidation or other process or to institute any legal action against companies or individuals for the recovery of monies paid by the company in terms of any guarantees or policies". Accordingly, these proceedings being by way of motion are not sanctioned by the resolution of the Applicant;

13.3 The Eighth Respondent, the person responsible for the execution of the contract, did so without following the correct internal procedures of Elgin whose performance was guaranteed and payment was made against demand without interrogating the breaches.

[14] Conversely, the Applicant' asserts that both the indemnity Respondents and the sureties have specifically consented to the jurisdiction of this Court in writing. In addition, the court must be alive to the fact that the following happened within the jurisdiction of this Court:

14.1 Execution of the guarantee;

14.2 Sunrise made Demand to the Applicant against the guarantee;

14.3 The Applicant made Payment to Sunrise pursuant to the demand.

[15] Insofar as failure of the Eighth Respondent to follow internal processes of Elgin is concerned, the Applicant contends that it is completely irrelevant to the cause of action relied on by it in circumstances where the guarantee, demand thereunder and payment constitute a complete and separate cause of action to the underlying *causa*.

[16] The essence of the Applicant's counter argument on the lack of authority is that the resolution authorising the deponent to the founding affidavit is flawless and requires no elaboration.

[17] The legal position on jurisdiction is as articulated by the Applicant and the Respondents do not and cannot take issue with it. It is trite that where a jurisdictional ground is present but the court has no jurisdiction over the person of the defendant, jurisdiction can be conferred or extended by consent of the defendant to the jurisdiction of the court. A High Court has jurisdiction in relation to all causes arising within its jurisdiction although it does not have jurisdiction over the person of the defendant and whether a cause arose in the area of jurisdiction at common law depends on whether that court is regarded as a proper forum. A contractual cause arises where the contractual cause was to be performed, wholly or in part, within the jurisdiction of a particular court.

See **Bid Industrial Holdings (Pty) Ltd v Strang & Others (615/06) [2007] ZASCA 144**,

Coface South Africa Insurance Co Limited 2014 (2) SA 382 (SCA)

Richman v Ben-Tovin (674-05) (2006) ZASCA 121

[18] The parties are agreed that this Court does not have any of the usual standard grounds of jurisdiction over the Respondents. That is because the indemnity and the suretyship, which triggered the Applicant's claim were all signed in Durban and all the Respondents reside in Durban. The performance on the contract was not within the jurisdiction of this Court. Demand against Elgin and all the sureties for payment by the Applicant was made in Durban.

[19] This Court admits all of the above because the Respondents are correct. The High Court in Durban unquestionably has CONCURRENT jurisdiction. Where the Respondents' assertion on jurisdiction loses favour with this Court is the suggestion that the court in Durban has exclusive jurisdiction and that the execution and performance in terms of the guarantee is *res inter alios acta* insofar as the Respondents are concerned.

[20] The contention above cannot be right because it loses sight of the fact that the contracts that were performed in Durban prompted the Applicant to perform in terms of the guarantee that was executed in the area of jurisdiction of this Court. Moreover, demand to the Applicant and payment occurred in Johannesburg.

[21] The Respondents also sought to argue that since Elgin is not part of these proceedings, the Applicant cannot sue the Respondents out of this Court. In doing this, the Respondents seek to undo the inextricable knot between the indemnity and the guarantee. It must be borne in mind that the indemnity Respondents and the sureties signed as sureties and co-principal debtors with Elgin and that makes them susceptible to being sued independently of Elgin.

[22] It is apparent that the indemnity and the suretyship although signed in Durban gave rise to the Applicant's performance in terms of the guarantee which was executed in Johannesburg. It is this Court's view therefore that the Applicant could have launched this application either in Durban or Johannesburg it being irrelevant that Elgin is not part of the proceedings.

[23] Apart from the cause of action on the guarantee arising in Johannesburg, Counsel for the Respondents argued that the introduction of the words, 'non-exclusive' and 'exclusive' in the consent clauses of the indemnity and the suretyship were meant to denote meaning different to the ordinary. If the author of the agreement wanted this Court to have jurisdiction, so he argued, would have said so without employing those words.

[24] This Court agrees with the elucidation that Counsel for the Respondents assigns to the two words but it is beyond my comprehension why it leads him to conclude that their use signifies that the Applicant does not have jurisdiction. The use of 'non-exclusive' in the case of the indemnity Respondents simply recognizes that there could be other courts with jurisdiction and the

Applicant has a choice. In this instance he had the liberty of either launching the application in Durban or in Johannesburg.

[25] In the case of the word, 'exclusive' used in the suretyship signed by the Seventh and the ninth Respondents, the meaning is straightforward – the jurisdiction of this Court is predetermined and the Applicant lacks choice. In both instances this Court has jurisdiction.

[26] Insofar as the guarantee itself is concerned and as it is evident from the defences raised, the Respondents do not take issue with the fact that the Applicant has complied with the formalities. Where applicable, the Applicant has also observed and performed in terms of the obligations imposed on it by the guarantee. The law regarding guarantees is not challenged thus, to the extent necessary, I set out below the legal position applying to guarantees.

[27] Generally, guarantees create a self-contained and primary obligation between the guarantor and the beneficiary and must be honoured by payment when a demand is made that complies with the formalities as recorded in the demand. Payment may only be refused in the most perfect cases of fraud. In the absence of an allegation that payment was demanded fraudulently and in bad faith, payment must be made. Disputes regarding and arising from the underlying contract (to which the guarantor is inevitably not a party) will not relieve the guarantor of its obligations under the guarantee. See in this regard, the case of **Coface South Africa Insurance Co Limited supra and Lombard Insurance**

Company Ltd v Landmark Holdings (Pty) Ltd 2010 (2) SA 86 (SCA) and cases therein referred.

[28] The facts in this case are a perfect fit to the law as described in the preceding paragraph. It follows that any problems that probably arose between the parties to the contract would have been extraneous to the Applicant. The aforesaid statement is subject to demand for payment having not been made fraudulently or in bad faith. Such is not the case in this current matter and the Applicant was therefore right to honour the terms of the guarantee.

[29] The Respondents have argued that the clause upon which the Applicant seeks to rely for the authority of the deponent to the founding affidavit, Mr Peter David Holmes, to institute proceedings is centered upon the proving of claims in business rescue liquidations. The Respondents conclude that the affidavits referred to therein relate to the claim forms in insolvency proceedings. The Respondents' argument in this regard is probably based upon Paragraph 5 of the resolution, which reads:

> *"….sign any documents required to prove a claim in business rescue, insolvency or against any other person (juristic or natural) and to sign any affidavit to proceed to prove any claim or institute any legal action for the recovery of any monies due to the Company arising from or relating to guarantee policies;"*

[30] The Respondents' construal of that paragraph is misguided especially in view of the overall objective of the resolution. The purpose of the resolution is captured in the pre-amble of the resolution in the following terms:

> "***WHEREAS:***
>
> *The Hollard Guarantees Division is in the business of issuing guarantee policies to various 3rd parties for construction projects. The Company would like to institute legal action to recover as much as possible from the securities of companies in whom securities are held." (sic)*

[31] It is evident that the pre-amble is general as it is not restricting the purpose to claims relating to business rescue and insolvency. Moreover, paragraph five itself lists a number of things that the deponent is authorized to do. One of those is where he is authorized to "*….sign any affidavits to proceed to prove any claim or institute any legal action for the recovery of any monies due to the Company arising from or relating to guarantee policies*." In my opinion, the Applicant is doing precisely what paragraph five of the resolutions empowers him to do. Accordingly, there is no merit in the Respondents' assertion and it is rejected.

[32] Turning to the Respondents' contention that the eighth Respondent failed to observe certain internal processes of Elgin when executing the contract. The Applicant is undoubtedly correct to regard this as being completely irrelevant insofar as it is concerned. For as long as the transaction was not tainted by fraud the Applicant was legally obliged to perform in terms of the guarantee regardless of the

disputes that might emerge between the parties to the contract, Sunrise and Elgin. Perhaps it could be instructive to refer to the following passage that I uplifted from the **Lombard** case supra:

"…..This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold. Whatever disputes may subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned. The bank's liability to the seller is to honour the credit. The bank undertakes to pay provided only that the conditions specified in the credit are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary……"

[33] That approach has been restated in numerous cases and it continues to hold to date. In the circumstances, the defence cannot avail any of the Respondents and as such it fails.

[34] Counsel for the Respondents believes that the Respondents have challenged the amount that they are alleged to be owing to the Applicant in paragraph 37 of the answering affidavit. This is not correct. The Respondents are complaining about not having been afforded opportunity to challenge the amount they are called upon to pay. Even if that were so, it would have been irrelevant insofar as the Applicant is concerned. Again, it is helpful to bear in mind what was stated in the Lombard case supra and many others. The Respondent's reference to **Gruhn v M Pupkewitz & Sons (Pty) Limited 1973 (3) SA 49 (AA) at 56 F** is, in the circumstances, misplaced.

[35] Against that background, the application succeeds and the Respondents are jointly and severally, the one paying the others to be absolved, ordered to:

1. *Make payment of the amount of R33 951 466.00 to the Applicant;*

2. *Pay interest on the above amount at a rate equal to the prime overdraft rate of ABSA Bank Ltd plus 2% being 11.25% from 31 March 2013 to date of final payment;*

3. *Pay costs of suit on the scale as between attorney and client.*

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B A MASHILE

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT: CT VETTER

INSTRUCTED BY: FRESE, MOLL & PARTNERS

COUNSEL FOR THE RESPONDENTS: GM HARRISON

INSTRUCTED BY: ZEILER JANKEY INCORPORATED

DATE OF HEARING: 09 MAY 2016

DATE OF JUDGMENT: 24 JUNE 2016