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.

4/05/2017
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 J

INTRODUCTION

[1] The first applicant *('Phenix')*, seeks payment of R 6 032 297.24 from the respondent ('*Hollard*'), based on a payment guarantee ('*the 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] Phenix brought this application as the Contractor (and principal agent) in terms of a building contract, against Hollard, the Guarantor, for payment of a Guaranteed Advance Payment Sum of R 6 032 297.24.

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

3.1. 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;

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

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

[4] Hollard filed an answering affidavit, 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.

[5] 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.

[6] The only basis on which the third parties dispute their liability towards Hollard is that Hollard is not indebted to Phenix or Quits (the Employer) under the Guarantee. In the event of this court finding in favour of Phenix or Quits, then Hollard should automatically be successful against the third parties.

[7] 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.

[8] 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 initially, there were objections about receipt of the affidavits, at the time of the hearing, the court was requested to adjudicate the matter upon all the affidavits presented.

[9] The Guarantee was issued by Hollard to secure an advance payment made to World of Windows by Phenix. The advance payment of R 6 032 297.24 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.

[10] The advance payment sum of R 6 032 297.24 was to be reduced by way of recoupments as specified in clause 1 of the Guarantee.

Clause 1 of the Guarantee 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"*

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;"

[11] The legal position, which was not disputed and which was 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."

[12] The existence of 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 extrapolated 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.' "

[13] Hollard and World of Windows aver 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.

[14] On 10 December 2015, this court ordered that:

> "The matter is referred for the hearing of oral evidence ... on the question whether or not the demand for payment in terms of the guarantee was made fraudulently by demanding payment for the outstanding sum".

[15] The court in its judgment of 10 December 2015 set out its reasons which gave rise to its order and such reasons are not repeated herein insofar as it is not necessary.

[16] The only oral evidence which was led was that of Mr Bhamjee, called by Phenix.

ASSESSMENT OF ISSUE REFERRED FOR THE HEARING OF ORAL EVIDENCE

Nature of Mr Bhamjee's evidence

[17] World of Windows relied on a payment advice which was issued by Phenix on 27 January 2015 (*'payment advice no 7'*). It also referred to a related subcontractor's recovery statement, prepared by Phenix, also dated 27 January 2015 (*'the recovery statement'*). In terms of these two documents, Phenix certified that the amount of R 3 400 000 was due and payable to World of Windows. Payment advice no 7 reflects that Phenix certified that R 3 400 000 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, making up the amount of R 3 400 000. The correctness of all these facts reflected in both payment advice no 7 and the recovery statement, were confirmed by Mr Reed, a representative of World of Windows, in an affidavit. He explained that it was a recoupment of the sum referred to in the guarantee. He said: *'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.'*

[18] In response to that assertion, Mr Bhamjee (Phenix's employee), in the applicants' replying affidavit, stated, amongst other things, that during the execution of the contract, the applicants had issued World of Windows with eight variations to

the works, that the recoupment of R 3.4 million concerned the variation orders and that, in any event, payment advice no 7 had been wrongly issued.

[19] Both the recovery statement and payment advice no 7, were signed by Mr Marais, the director of Phenix, and not Mr Bhamjee.

[20] In the recovery statement Mr Marais expressly reflected the R 3.4 million as being '*Recoupment of Advance Payment*' (line 1.2.2 thereof). The reference to an '*advance payment*' which could be '*recouped*' is 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 R 3.4 million as being an *'Advance Payment Recoupment [Recovery Statement 1.2]'*.

[21] This amount of R3 400 000 was dealt with at the same time in payment advice no 7, where it was subtracted from the gross and net amount certified of R3 400 000 (lines 7.0 and 9.0) by way of an *"Advance Payment Recoupment"* (line 13.1). Plainly then, and in terms of the express terms of payment advice no 7 itself, the R3 400 000 was recouped from the amount then being certified in terms of that Payment Advice, leaving a net amount of *"0,00"* (line 15.0) due to World of Windows. This could only be a recoupment against the advance payment of R6 032 297,24 made by the Applicants.

[22] There is no other document to which this court was referred which provided for recoupments other than the Guarantee.

[23] Mr Bhamjee's evidence in respect of the interpretation of the content of payment advice no 7 and the recovery statement, is inadmissible as the document should speak for itself or Mr Marais should speak to it, see *Padayachee v Adhu*

Investments CC and others [2016] 2 ALL SA 555 (GJ) where the court held at para [113], as follows:

> 'In *Johston v Leal*, 1980 (3) SA 927 (AD) Corbett JA observed at 942 H – 943B as follows : *'As has been indicated, the parol evidence rule is not a single rule.*
> *It in fact branches into two independent rules, or sets of rules: (1) the integration rule, described above, which defines the limits of the contract, and (2) the rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract: see, for example, the exposition by SCHREINER JA in Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 453 - 5. (For convenience I shall call this latter rule "the interpretation rule".) Neither rule, in my opinion, affects the matter under consideration.'*
> [114] While the "new" approach to interpretation referred to herein has clearly abolished one of the "branches" of the parol evidence rule i.e. the "interpretation rule", which stated that extrinsic evidence was not admissible in order to determine the meaning of a written instrument, it in no way affects the operation of the other "branch" of the parol evidence rule, being the so-called "integration rule", which determines the content or (in the words of Corbett JA in Johnston v Leal), the "limits" of a written instrument.
> [115] It is apparent from *KPMG v Securefin* (which was specifically identified by Wallis JA in *Bothma-Batho* as being representative of the "new" approach to interpretation) that the integration rule remains good law" (footnotes omitted).

[24] There is no evidence before court as to what Mr Marais thought. He drafted payment advice no 7 and the recovery statement.

[25] In terms of the Guarantee the beneficiary is Quits. However, Phenix has at all material times represented Quits and it pursues the relief in the application in its own right, alternatively, on behalf of Quits.

[26] In the matter of *Commissioner of Inland Revenue vs Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) at 606G Centlivres CJ said:

> "[a] company is an artificial person with no body to kick and no soul to damn and the only way of ascertaining its intention is to find out what its directors acting as such intended."

[27] In this matter none of the directors of Phenix or Quits testified. The Applicants failed to call Mr Marais, a director of Phenix with operational knowledge of the project, notwithstanding his presence in Court. Only Mr Bhamjee was called to testify but in circumstances where this Court had already found in its judgment referring the matter to the hearing of oral evidence that:

> "Mr Bhamjee is not the author of the payment advice or the recovery statement. He can accordingly not speak to the document....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. ... There is no evidence before court as to what Mr Marais thought."

Nothing has changed.

[28] As payment advice no 7 was issued by Phenix itself, and signed by its director Mr Marais, it was not possible for Mr Bhamjee, an employee of the company and Mr Marais' junior, to ascribe a meaning to the document different to that set out in the company's own document. Phenix cannot escape the meaning of its own document by calling an employee to say that the company's document means something which it does not state. Even if Mr Bhamjee validly believed that the document meant something else, that irrelevant belief cannot be ascribed to Phenix. As set out in *The Law of South Africa* 1st Reissue Vol 4 Part 1 para 35:

"The acts and omissions, intentions, purposes, and knowledge of certain persons are the company's acts and omissions, intentions, purposes and knowledge. That is to say, because the company as such - as a mere legal persona - has no physical existence and hence cannot act and has no mind or will of its own, the law attributes acts and states of mind of certain persons to the company. Such persons do not act or think on behalf of, or for, the company, that is as representatives, agents or delegates or servants. Rather, within their appropriate sphere they are an embodiment of the company: they act and know and form intentions through the persona of the company. Their minds are its mind; their knowledge its acknowledge; their intention its intention. This, the "directing mind" or "alter ego" doctrine, has been developed ..."

"... the law treats the acts or states of mind of those who represent and control the company as the acts and states of mind of the company itself."

"...a director or officer who signs a document or instrument in the company's name does not sign as agent but effects the company's own signature;"

"The directors of a company are, prima facie likely to be regarded as its directing mind and will."

[29] Plainly, the act of Mr Marais in signing payment advice no. 7 in the unequivocal terms which he did, represents the act of the director who is in control of the company and reflects the state of mind of the company itself. Mr Bhamjee's alleged beliefs in contradiction of the express terms of payment advice no 7 (and the Recovery Statement) are quite irrelevant.

[30] Mr Bhamjee testified that two advance payments were made: R 6 032 297.24 (covered by the Guarantee) and R 2 112 371.82 (paid in respect of Variation Orders 1 - 7) totalling R 8 144 669.06. On Phenix's own documents a recoupment in the amount of R 3.4 million was made against the advance payment of R 8 144 669.06, so that when demand was made for payment under the Guarantee they knew that

they were not entitled to be paid the amount of R 6 032 297.24, see *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd* [2014] ALL SA 307 SCA at [17]. As at date of demand, not more than R 4 744 669.05 (R 8 144 669.06 less R 3 400 000) could have remained to be recovered on any basis.

[31] Payment advice no 7 is dated 27 January 2015 and is signed by Mr Marais. Final Payment Advice no 8 (*'Payment Advice no 8 '*) is dated 15 December 2015 and signed by Mr Marais which confirms the recoupment of R 3 400 000 recorded in payment advice no 7. Payment Advice no 8 contains no correction by Mr Marais.

[32] A director of Phenix (Mr Marais), on two occasions, once prior to cancellation of the contract and once after cancellation, confirmed that the information recorded in the documents, is correct. That, absent a contrary version from a witness qualified to speak for the Applicants, must be taken to be the position of the Applicants.

[33] Whilst Mr Bhamjee did sign the letter of demand on 27 February 2015 it is clear that in doing so he acted on the instructions of Mr Marais and Mr Iwuajoku, the Chief Executive Officer of Quits. Mr Bhamjee was never anything more than an employee of Phenix and, whilst he testified that he discussed the preparation of payment advice no. 7 with Mr Marais "*via email and correspondence*" none of the documents were even discovered, let alone placed before the Court. That Mr Bhamjee only ever acted in his capacity as an employee of Phenix is also consistent with the fact that his delegated authority existed only in relation to matters between Quits and World of Windows; it did not exist in relation to the Guarantee and Hollard.

[34] It follows from the above that by leading the evidence of only Mr Bhamjee the applicants failed to adduce any evidence that could be regarded as representative of

their intention in calling up the Guarantee, with the result that they did not do anything to tip the probabilities in their favour.

Intention of Mr Bhamjee

[35] Should I be wrong in concluding that Mr Bhamjee can not speak to the intention of the Applicants, I would nonetheless conclude that the issue referred for the hearing of oral evidence, should be decided against the applicants.

[36] In *Loomcraft Fabrics CC v Nedbank Ltd* 1996 (1) SA 812 (A) ([1996] 1 All SA 51) the court emphasised that fraud on the part of the beneficiary would have to be clearly established and, although the onus would be discharged by proof on a balance of probabilities, as in any case where fraud was alleged, it would not lightly be inferred (at 817G – H). (This was confirmed in *Casey v FirstRand Bank Ltd* 2014 (2) SA 374 (SCA)).

[37] In *R v Meyrs* 1948 (1) SA 375 (A) at 382 – 3 Greenberg JA summarised the legal position as follows:

> "The affirmative manner in which this statement is made does not mean that the onus rests on the person charged with making a fraudulent representation to prove his honest belief; the onus is on the party making the charge to disprove it. The requirement that the belief should be honest is referred to in Halsbury (2nd ed., Vol. 23, sec. 59), where it is said that a belief is not honest which, 'though in fact entertained by the representor may have been itself the outcome of fraudulent diligence in ignorance – that is, of a wilful abstention from all sources of information which might lead to suspicion, and sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense) believe'.
>
> It appears to me to follow that, in English law, proof of negligence in making enquiries as to the facts which are represented, even though it be of so extreme a

> degree as to merit the epithet of 'gross', can never in itself amount to proof of the absence of an honest belief, and the same applies to an absence of reasonable grounds for the belief (see Derry v Peek (supra, at pp. 361, 363, 369 and 375) and cf. Basner v Trigger (1946 AD 83, at p. 406". (emphasis added)

[38] Based on this decision *Christie The Law of Contract in South Africa 6th Edition* at p 305 concludes that:

> 'even gross negligence in making inquiries or gross unreasonableness in drawing inferences from known facts 'can never in themselves amount to an absence of honest belief'.

[39] In the affidavits filed by Mr Bhamjee he stated, amongst other assertions in this regard, that the advance payment recoupment reflected in payment advice no. 7 concerned variation orders and that the value of materials reflected in such advice was incorrect. During the course of his oral evidence Mr Bhamjee jettisoned his assertion that the payment advice was incorrect in any way and confirmed that it contained no mistake and, furthermore, that it was never corrected in payment advice no 8.

[40] Mr Bhamjee explained in his evidence that the recoupment shown in payment advice no. 7 did not relate to the initial advance payment of R6 032 297.24 but concerned a subsequent advance payment in respect of variation orders in the amount of R3 519 284.01. The first difficulty with this version is that no payment for R3 519 284.01 was ever made. Quits paid R2 112 371.82 on 10 October 2014 in respect of variation orders 1 - 7 and, though Quits undertook to pay the amount of R1 406 912.19 in respect of variation order 8, it never did so prior to the contract being cancelled, or at all. The result is that at least a portion of the recoupment reflected in payment advice no. 7 had to have been made against the advance

payment secured by the Guarantee, so that the Applicants were not entitled to demand the full amount of the Guarantee.

[41] Mr Bhamjee recognised the importance of the amount of R1 406 912.19 insofar as he identified the occurrence of that payment to be determinative in whether or not the demand was fraudulent. He then conceded that he knew when he made the demand that the amount of R1 406 912.19 would not be paid (dolus directus), alternatively, he acknowledged that he foresaw the possibility that his demand would be incorrect but he nevertheless proceeded to make the demand (dolus eventualis). On this critical issue he also sought to change his version but ultimately conceded that in making the demand for the full amount he reconciled himself with the fact that such claim might ultimately prove to be wrong.

[42] Mr Bhamjee's knowledge cannot be reconciled with an innocent mistake because, firstly, he made no such concession and, secondly, the explanation that he gave for his conduct exposes his fraudulent motive as he consistently said that the R 3 400 000 had nothing to do with materials but then said:

> 'I refer back to what I said, the 3.4 million that was certified as material, I had no guarantee that I could use that material. I had no value for that material and the recoupment was against works done sir. There is nothing fraudulent about the fact that those containers could have been on site and could have been completely valueless and the 3,4 million that was certified could have been a zero in the final certificate based on whether I got someone to actually install it.'

[43] Mr Bhamjee sought to avoid the inevitable conclusion that the demand was fraudulent, by arguing that payment advice no 7 did not have to be disclosed to Hollard because it related to Variation Orders 1 to 8. This argument fails at a number of fundamental levels: His evidence, in which he sought to describe payment advice

no 7 as relating to the Variation Orders, contradicted its express terms, and was therefore inadmissible. Not only that, but the interpretation of payment advice no 7 must be based on the wording of payment advice no 7 and extraneous evidence, for the purposes of interpretation, is inadmissible. There is nothing in payment advice no 7 which could lead to the inference that it could relate to the Variation Orders: indeed, its express terms made it plain that it related to materials on and off site, and not Variation Orders; a recoupment was being effected in terms thereof, in circumstances where the only reference to any recoupment in any other document was the reference to the recoupment expressly provided for in the Guarantee; the calculation in payment advice no 7 of the percentage of the work executed by World of Windows for the purposes of the Guarantee was calculated with reference to the contract amount excluding variations.

[44] Of particular importance is the fact that Variation Order No. 8 for R1 406 912,19 was never paid. Not only that, but after the cancellation of the contract by Phenix itself on 27 February 2015, there could have been no prospect at all that it would ever have been paid. Thus, when the demand for R6 032 297,24 was sent, being specifically based upon the cancellation of the contract, neither Phenix nor Mr Bhamjee could have believed that Variation Order No. 8 would be paid. In this situation, no amount of linguistic gymnastics, as attempted by Mr Bhamjee in evidence, could conceivably explain how a recoupment could be made against an amount which was never paid - and which he knew, when Phenix made demand, would never be paid.

[45] Mr Bhamjee was not a credible witness. I list but a few reasons:

45.1. He was generally evasive. Sometimes obviously so. During cross-examination by Mr MacWilliam representing World of Windows, it took 5 pages of questioning for Mr Bhamjee to confirm one paragraph of the replying affidavit he had deposed to. At other times it was evident from his penchant to give very long answers to simple questions. There were times when he was simply obfuscatory. Mr McCaslin representing Hollard asked him whether, if the value of variation order 8 were paid in the final account, his demand for the full amount of R 6 032 297.20 would have been accurate. He did not respond initially but answered that he knew where the question was heading. He finally agreed to the proposition. Mr McCaslin then put the converse. He asked whether it did not follow, axiomatically, that if variation order 8 were not paid in the final account, then the demand for the R 6 032 297.20 would have been incorrect. He did not make this obvious concession.

45.2. On occasion the version he gave was inherently implausible and at other times it was inherently inconsistent. During his evidence he had advanced three reasons why Phenix were not able to recoup against the advance payment/s. They were: that the letter of credit and not the advance payment guarantee was intended to be used for the payment of the material, he didn't have the original and no work had been done. Yet, his entire version was centred on the fact that the R 3 400 000 recoupment reflected in payment advice no 7, included

the R2 112 371.82 paid in October 2014 for which no work had been done.

45.3. Significantly, Mr Bhamjee changed his version more than once on the important aspect of what he allegedly told Ms Hildebrand in the preparation of payment advice no 7. According to an email from Ms Hildebrand to Mr Marais on 26 January 2015, Ms Hildebrand enclosed payment advice no 7 and stated that she calculated the amount of the recoupment from the insurance values of the three containers containing materials. Initially Mr Bhamjee stated that he told Ms Hildebrand to prepare the payment advice on the basis of the variation orders. Then he said that the certification was actually done in respect of the materials up to the value of the variation orders. On the face of it, Ms Hildebrand used the insurance value and not the value of the variation orders, and although Mr Bhamjee was asked on 9 separate occasions why Ms Hildebrand had apparently acted contrary to his instruction, he could not answer the simple question. In attempting to answer the question, however, Mr Bhamjee even said that payment advice no 7 was simply a token certificate, which was inconsistent with his evidence that payment advice no 7 was actually taken up in the final payment certificate. Ultimately, Mr Bhamjee went full circle in order to confirm the original version that he gave in his affidavit, namely that payment advice no 7 related to entirely separate variation orders.

[46] Mr Bhamjee's evidence also does not match either the Applicants' or World of Windows' versions of the contract. The World of Windows' tender of 4 July 2014 expressly recorded that *"any VO's that might arise will have to be paid for on acceptance of our quotation"*. This is what happened when Variation Orders 1 to 7 were paid and no question of any recoupment could arise. On the other hand, Phenix's unsigned letter of appointment provided in paragraph 17.7 to 17.8 thereof, that variations were not to be proceeded with, without the prior approval of the main contractor, and approval was granted in relation to Variation Orders 1 to 7. This letter of appointment does not deal with payment for variations at all. To the extent that it could be suggested that it is relevant, the letter of appointment provides that the balance due was to be provided by way of the letter of credit (there being no reference to variation orders), it is clear that the Applicants in any event did not want the letter of credit to be changed and elected to pay Variation Orders 1 to 7 in cash. Thus, there is no question of any recoupment arising in respect of any variation orders which were paid, whichever of the parties' respective contractual terms one has regard to.

[47] That payment advice no 7 is exactly what it was expressly stated to be, is clearly illustrated by the status report and final accounting which followed and which documents were prepared by Phenix itself. Mr Bhamjee was a co-compiler thereof and had to oversee their completion. The status report indicates that the goods listed in the World of Windows invoices did indeed arrive on site and were fitted at the Applicants' instance; even taking the 85 % / 15 % split adopted by the Applicants, the value of the works executed by World of Windows as calculated by the Applicants themselves, amounted to no less than R4 699 417,19, which far exceeds the amount

of R3 400 000 previously certified in payment advice no 7. This also means that a significant portion of the works to which the advance payment of R6 032 297,24 related had indeed been executed before December 2014 - and on any basis before cancellation by Phenix in February 2015; included in the amount of R4 699 417,19 is the amount of R506 196,90, which is in respect of Variation Orders.

[48] In terms of the final payment advice no 8, the previous amount certified of R3 400 000 was not varied in any way, but carried forward unaltered. A further amount of R1 299 417,19 was then certified in respect of further works executed, making up the total of R4 699 417,19, being the same amount referred to in the status report. That these figures were accepted as being correct by the Applicants, also appears from the Payment Certificate Notification, the Recovery Statement No. 8 and the related breakdown of the Payment Advices and Recovery Statements.

[49] Mr Bhamjee's attempts to explain away the unpalatable consequences of these documents with reference to the fact that they were prepared in December 2015, are without merit: what they demonstrate is that still in December 2015 payment advice no 7 was regarded as nothing other than a genuine document which had correctly recorded the entries set out therein. Thus, there is, and was, no basis for the Applicants, let alone Mr Bhamjee, to suggest anything else and Mr Bhamjee's attempts to do precisely that must inevitably fall to be rejected.

[50] It is also striking that in the course of his cross-examination Mr Bhamjee was forced to undertake a major reformulation of his alleged state of mind when it became apparent to him that variations of R506 196,90 had been accounted for in the Status Report of which he was a co-author. When he apparently appreciated the consequences thereof, he suddenly could no longer explain the obvious entries in the

Status Report relating to the Variation Orders and needed time to think of an appropriate response. In the result, whereas he had initially made the startling allegation that Ms Hildebrand had ignored his instruction *"to certify against the Variation Orders"*, he now did an about-face and now described the process as being one in which Ms Hildebrand was indeed asked to certify *"material"*, but against the value of the Variation Orders. Neither version equates to the original defence raised in his affidavit. The fact that Mr Bhamjee was driven to such fundamental changes in his story, is yet further illustration of the fact that the true situation is that there was no basis for the Applicants to claim the full guaranteed amount of R6 032 297,24 from Hollard and they knew this full well.

[51] The version advanced by Mr Bhamjee during the course of his oral evidence was inherently improbable and is rejected on that basis alone. See *R v Meyers* 1948 (1) SA 375 (A) at 383:

> "(A)bsence of reasonable grounds for belief in the truth of what is stated may provide cogent evidence that there was in fact no such belief."

[52] However, when the aforementioned considerations as to Mr Bhamjee's credibility are taken into consideration, his version cannot be believed and is rejected as being untrue.

[53] The applicants have failed to tip the probabilities in their favour and the ineluctable conclusion to be drawn is that the demand of 27 February 2015 was fraudulent.

ALTERNATIVE INTERPRETATION

[54] Contrary to the argument advanced at the initial hearing prior to the issue of fraud being referred for the hearing of oral evidence and contrary to the versions advanced both in the replying affidavit and during Mr Bhamjee's oral evidence, Mr van Tonder, representing Phenix, in his closing argument, argued for an entirely new construction of the Guarantee. He argued that payment advice no 7 had nothing to do with the Guarantee, as it was not a recoupment as provided for in the Guarantee. Whether the payment advice constituted a recoupment, so the argument ran, required an interpretation of the Guarantee and not an interpretation of the payment advice. Assuming, without deciding, that the order referring the fraud to the hearing of oral evidence, permits the introduction of this argument, I would find that the construction of the Guarantee now proposed has no merit.

[55] The argument places much reliance on the proviso contained in the note to clause 1 (as quoted in paragraph 10 hereof):

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

[56] In my view, the note in clause 1 anticipates irregular recoupment amounts or periods being known to all at the time of the issuing of the guarantee. In such event, a schedule of recoupment amounts or periods would be attached to the Guarantee. That was however, not what occurred here and that '*Note*' or proviso, thus has no application.

[57] Clause 1.2 provides as follows:

> "The Guarantor's liability shall be limited to the outstanding diminishing amounts of the Guaranteed Advance Payment Sum as follows:
>
> 1.2.1 The Guaranteed Advance Payment Sum on receipt thereof by the Recipient

1.2.2 The full outstanding balance after the deduction of each recoupment made in terms of the monthly payment certificate as stated in 1.1.

1.2.3 After the deduction of the last scheduled recoupment payment or on settlement of the full outstanding balance this Advance Payment Guarantee shall expire."

[58] Mr van Tonder argued that the first question which falls for determination is whether the Guarantee contemplated the R 3.4 million payment advice. He argued that payment advice no 7 is not a 'certificate' as contemplated in clause 1.2.2 and that certificates in respect of recoupments could only relate to work '*performed*' or work '*done*' and not also to certificates issued in respect of value of materials. If this interpretation of the Guarnatee were accepted, he contended, then there could be no fraud, as it was common cause that when the demand was made, ie on 27 February 2015, no work had been done.

[59] '*Works*' is defined to mean '*Aluminium Windows and Curtain Walling*'. In my view there exists no scope to argue that this definition excludes materials. The Guarantee further provides for Phenix (the principal agent) to issue payment certificates/advices and recovery statements in respect of this Guarantee. This is precisely what Phenix's director did in issuing payment advice no 7.

[60] The interpretation of the Guarantee now contended for flies in the face of the evidence presented on behalf of Phenix. Payment advice no 7 refers to an '*Advance Payment Recoupment*'. In it's replying affidavit, Phenix speaking through Mr Bhamjee, said that the recoupment referred to in payment advice no 7, relates to variation orders 1 to 8. The fact that payment advice no 7 contained a recoupment was not disputed. The only dispute was whether it related to variation orders or to the R R6 032 297,24 advance payment. This 'new' interpretation ie that no recoupment

whatsoever had occurred, was not even raised in Phenix's replying affidavit. It was raised for the first time after Mr Bhamjee had testified and in closing argument. Be that as it may, such a construction is irreconcilable with the express wording of the Guarantee and with the evidence presented in the case. The recoupment as reflected in payment advice no 7 was confirmed by Mr Marais, a director of Phenix, in the final payment advice no 8, which was prepared and completed after cancellation of the contract between Phenix and World of Windows.

[61] During his evidence in chief, Mr Bhamjee testified that recoupment could begin once the materials had been shipped to site ie prior to installation. He confirmed that payment advice no 7 had been completed in response to World of Windows's request dated 19 December 2014 which recorded the value of material sent to site from Cape Town in the sum of R 3 774 323.93 and value of material sent to site from Holland (revolving doors) R 1 980 000. There is simply no evidence to support the construction of the Guarantee now suggested.

CONCLUSION

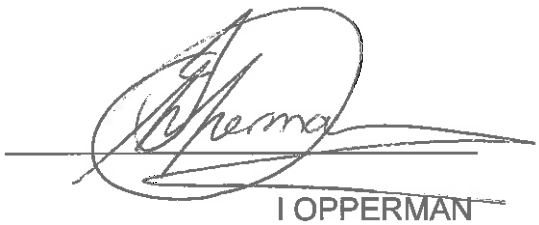
[62] I accordingly find that the demand made by the applicants was fraudulent and Hollard is excused from paying any amount under the guarantee. The applicants do not get rewarded for their dishonesty by simply reducing the amount of the demand to exclude that portion to which they were never entitled.

ORDER

[63] In the circumstances, I grant the following order:

63.1 The applicants' application is dismissed with costs, including the costs reserved in paragraph 36.8 of the Order granted on 10 December 2015 and includes the costs of two counsel in respect of the respondent.

63.2 The applicants are directed to pay the Respondent's and the Third Parties' costs incurred in the application, jointly and severally, the one paying the other to be absolved.



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

Heard: 4 April 2017
Judgment delivered: 5 May 2017
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