

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.

3/07/2017  
DATE

[Signature]  
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  
WORLD OF WINDOWS PROJECTS (PTY) LTD  
ALUVISTA WINDOWS (PTY) LTD  
WORLD OF WINDOWS JOHANNESBURG (PTY) LTD  
TWO OCEANS GLASS AND ALUMINIUM (PTY) LTD**

First Third Party  
Second Third Party  
Third Third Party  
Fourth Third Party  
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

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### JUDGMENT ON LEAVE TO APPEAL

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#### OPPERMAN J

- [1] This is an application for leave to appeal against judgments handed down by this court on the 10 December 2015 (*'first judgment'*) and 5 May 2017 (*'second judgment'*). Leave to appeal is sought against the whole of the judgments.
- [2] In the decision of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*, 2013 (6) SA 520 (SCA) Wallis JA observed that a court should not grant leave to appeal, and indeed is under a duty not to do so, where the threshold which warrants such leave, has not been cleared by an applicant in an application for leave to appeal. In paragraph [24] he held as follows:
- [24] For those reasons the court below was correct to dismiss the challenge to the arbitrator's award and the appeal must fail. I should however mention that the learned acting judge did not give any reasons for granting leave to appeal. This is unfortunate as it left us in the dark as to

her reasons for thinking that enjoyed reasonable prospects of success. Clearly it did not. Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and, as has been demonstrated, the appeal was bound to fail on the facts. **The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.** It should in this case have been deployed by refusing leave to appeal.” (emphasis added)

- [3] It bears mentioning that the legislature has deemed it appropriate to raise the bar by providing in section 17 of the Superior Courts Act 10 of 2013 that what an applicant in an application for leave to appeal should show is that the appeal ‘*would*’ have reasonable prospects of success not ‘*may*’.
- [4] I have considered the grounds of appeal and the arguments advanced in the application for leave to appeal. In a nutshell, the applicants contend that the court interpreted the guarantee incorrectly. It is contended that the court ought to have found that recoupment could only take place against work performed and not also on material delivered. Because payment advice no 7 reflected zero in respect of the value of work executed, it did not constitute or reflect recoupment for purposes of the guarantee. This was the argument raised belatedly by the Applicants in argument after the oral evidence of Mr Bhamjee during which he did not testify that he had understood the guarantee in this manner.
- [5] In *Loomcraft Fabrics CC v Nedbank and Another*, 1996 (1) SA 812 (A) at 815I the following was held:
- ‘The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified and the credit, including

typically a set of bills of lading, **which on their face conform strictly to the requirements of the credit'** (emphasis added)

- [6] In terms of clause 4.0 of the guarantee the respondent's obligation to pay is expressly restricted to the '*guarantor's maximum liability referred to in 1.0*' and the respondent is only obliged to pay '*the Guaranteed Advance Payment Sum or the full outstanding balance*'. In terms of clause 1.0 of the guarantee a recoupment period of 4 months commencing in October 2014 is expressly prescribed, as is a monthly amount of R1 508 074.31. Respondent's liability was expressly '*limited to the outstanding diminishing amounts of the Guaranteed Advance Payment Sum*'.
- [7] In my view there are only two constructions of the guarantee postulated in clause 1.1, namely:
- 7.1. Either the express terms of clause 1.1 provide that the advance payment of R 6 032 297.31 was recouped in four monthly recoupments in the amounts of R1 508 074.31 each commencing in October 2014;
  - or
  - 7.2. If '*the recoupment amounts and/or periods are irregular*', '*a schedule of recoupment amounts and dates*' had to be attached, as provided for in the '*Note*' in the fourth line of the table. No such schedule was attached so this construction falls away.

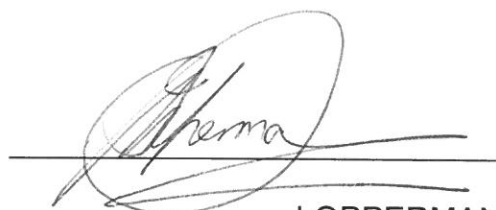
- [8] Thus, in terms of the express provisions of clause 1.1, the recoupment was automatic, and as no rectification of the guarantee was sought, no amount could be recovered in terms thereof after the four months had passed.
- [9] It is only because the court went beyond clause 1.1 and had regard to payment advice no 7 placed before the court in the alternative by the third party (and also relied upon by the respondent), that the applicants had any chance of success. Absent reference to that payment advice, the applicants had themselves laid no basis for any amount to be claimed in terms of the guarantee after the four months had expired.
- [10] In these circumstances, there is no factual or legal basis for the Applicants' alternative interpretation/construction. Mr Bhamjee did not testify that he understood the guarantee in this manner. Had he testified to that, he would, no doubt have been asked to what other '*guaranteed advance payment sum*' the recoupment related. There is only one '*guaranteed advance payment sum*' referred to in the guarantee, being the amount of R6 032 297.24. In terms of the guarantee it is only that sum which was to be recouped. There exists no evidence of any other '*advance*' payments that were to be '*recouped*'.
- [11] The applicants elected to proceed by way of motion and thus the *Plascon-Evans* rule applies. The respondent and third party raised payment advice no 7. There has been no explanation forthcoming in the way of admissible, acceptable evidence, why payment advice no 7 does not relate to recoupments in respect of the guarantee. Payment advice no 7 was issued by its director, Mr Marais, and he did not testify.

[12] At the very least the Applicants had to bring themselves within the terms of the guarantee itself. On the express terms of the guarantee, nothing would be claimable in February 2015. In hindsight, the referral to the hearing of oral evidence, in the face of the express provisions of the guarantee and the applicants' failure to have brought themselves squarely within the four corners of the guarantee, seems charitable. It is perplexing that the referral to the hearing of oral evidence is now the subject of attack under circumstances where the referral was expressly requested by the applicants.

[13] In my opinion the appeal would not have reasonable prospects of success.

[14] I accordingly make the following order:

Leave to appeal is refused with costs, the first and second applicants to pay the respondents' and the third parties' costs, jointly and severally, the one paying the other to be absolved. The Respondents' costs are to include the costs of two counsel.



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

Heard: 23 June 2017

Judgment delivered: 3 July 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