IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 6998/2018

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
DATE: 27 AUGUST 2021

In the matter between: -

COMPASS INSURANCE COMPANY LIMITED	Applicant
and	
CIVMAQ PROJECTS (PTY) LTD	First respondent
(REGISTRATION NUMBER: [....])	
MAQUBELA, DONALD MONGEZI	Second respondent
(IDENTITY NUMBER: 6[....])	
NXUMALO, NKOSINGIPHILE DOLLY PURITY	Third respondent
(IDENTITY NUMBER: 7[....])	

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 27 August 2021.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] The applicant (*"Compass"*) seeks payment from the respondents, jointly and severally, the one paying the others to be absolved, of the amount of R1,759,908.62 together with interest and costs on the attorney and client scale.

[2] The respondents opposed the application and to this end filed an opposition to the relief claimed by Compass, on the 10th of July 2018. The respondents were assisted by attorneys.

[3] On the 3rd of March 2021 an order was granted compelling the respondents to deliver their heads of argument within three days of the granting of the order, failing which their opposition to the main application may be struck.[1] The respondents failed to do so.

[4] On the 11th of March 2021 the attorneys acting for the respondents formally withdrew as attorneys of record by way of notice.

[5] On the 28th of April 2021, the applicant applied for an opposed hearing date and on the 7th of July 2021, one was allocated for the 23rd of August 2021. On the 13th of July 2021 a copy of the notice of set-down was served by way of sheriff op the respondents at their chosen *domicilium citandi et executandi*.[2] Despite proper notification, there was no appearance on behalf of the respondents.

THE APPLICANT'S CASE

[6] Compass is a short-term insurance company registered to conduct guarantee insurance business. On the 11th of May 2011, the first respondent executed a counter-indemnity and the second and third respondents deeds of suretyship, in favour of Compass.

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[1] Order to compel: pp A1 and A2.
[2] Returns of service: pp B42, C4 and C5.

[7] I interject to mention that the first respondent underwent a name change on the 19th of August 2014 from Khuboni Civil Projects (Pty) Ltd to Civmaq Projects (Pty) Ltd.[3]

[8] The material terms of the written indemnity, for purposes of the present application, were as follows: -

> [a] Compass agreed to enter into certain guarantees, undertakings and suretyships on behalf of the first respondent in favour of certain persons, companies, local, provincial or governmental authorities or other bodies for the due payment by the first respondent of any monies owing from time to time or for the due performance by the respondent of its obligations under any contracts entered into;
>
> [b] Compass agreed to execute the guarantees against signature and delivery by the first respondent of a written counter-indemnity and of the additional securities required by Compass;
>
> [c] The first respondent would indemnify Compass and hold it harmless from and against all and any claims, loss, demands, liability, costs and expenses of whatsoever nature, including legal costs as between attorney and client, which it may at any time sustain or incur by reason or in consequence of having executed any guarantees on behalf of the first respondent;[4]
>
> [d] The first respondent undertook and agreed to pay to Compass on demand any sums of money which it may be called upon to pay under the guarantees, together with interest thereon, whether or not Compass at such date shall have made such payment, and whether or not the first respondent admitted the validity or amount of such claim against Compass under the guarantees;[5]

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[3] Founding affidavit: annexure "COM2", p 1-25.
[4] Founding affidavit: annexure "COM3.1"; counter-indemnity, clause 1.1.
[5] Founding affidavit: annexure "COM3.1"; counter-indemnity, clause 1.2.

[e] If the first respondent disputed the validity of amount of any claim against Compass, it would nonetheless be obliged to deposit the amount with Compass, on demand, pending adjudication or settlement of such dispute;[6]

[f] The first respondent would be liable to Compass for payment of interest on any sums which it may pay under the guarantees, from the date of such payment until it is repaid at the rate equal to the overdraft rate of Standard Bank of South Africa Limited, plus 2 %;[7]

[g] The first respondent's liability to Compass would be unlimited;[8]

[h] The first respondent chose as its *domicilium citandi et executandi* [....] L[....] Street, Boksburg.

[9] The written deed of suretyship executed by the second and third respondents in favour of Compass provided as follows:[9] -

[a] The second and third respondents bound themselves as sureties for and co-principal debtors jointly and severally with the first respondent, *in solidum* for the due payment by the first respondent to Compass of all and any amounts which the first respondent may be liable to pay to Compass under the indemnify and further indemnified Compass and held it harmless from and against all and any claims, losses, demands, liabilities, costs and expenses of whatsoever nature, including legal costs as between attorney and client, together with interest at the prime overdraft rate of Standard Bank of South Africa Limited plus 2 % to date of payment;

[b] The second and third respondents undertook and agreed to pay to Compass on demand any sums of money which Compass may be called

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[6] Founding affidavit: annexure "COM3.1"; counter-indemnity, clause 1.2.
[7] Founding affidavit: annexure "COM3.1"; counter-indemnity, clause 1.3.
[8] Founding affidavit: annexure "COM3.1"; counter-indemnity, clause 2.
[9] Founding affidavit: annexure "COM3.2", p 1-34.

upon to pay under any guarantee, whether or not Compass shall at such date have made such payment and whether or not the first respondent admitted the validity of such claims against Compass under the guarantee;[10]

[c] The second and third respondents renounced the legal exceptions or benefits of excussion, division, cession of action and no value received;[11]

[d] The second and third respondents chose as their *domicilium citandi et executandi* for the effectual service of all notices and legal processes in regard to flowing from the surety at [....] S[....] Street, Libradene, Boksburg.[12]

[10] On 11 April 2012 Compass, through its underwriting agent, issued a guarantee at the instance and request of the first respondent in favour of the Ekurhuleni Metropolitan Municipality (*"the employer"*). In terms of the guarantee, Compass held itself liable to the employer as guarantor and co-principal debtor for the performance of the first respondent in respect of a construction contract concluded between the first respondent and the employer. The liability of Compass was limited to payment of a maximum amount of R1,759,908.62.

[11] On 23 June 2017, the employer instituted action against Compass claiming payment under the guarantee for an amount of R1,759,908.62 together with interest at the rate of 10.25 % *a tempore morae* as well as costs.

[12] On 26 January 2018 Compass, through its attorneys of record, demanded payment from the respondents in terms of the indemnity. Notwithstanding demand, payment of the amount had not been forthcoming from the respondents and as a consequence the present application was instituted.

[13] Compass attached to its founding affidavit as annexure "COM6"[13] an extract from Standard Bank of South Africa's website indicating the prime overdraft rate for purposes of the calculation of interest as 10.25 % effective from 21 July 2017.

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[10] Founding affidavit: annexure "COM3.2", clause 1, pp 1-35 and 1-36.
[11] Founding affidavit: annexure "COM3.2", clause 4, p 1-36.
[12] Founding affidavit: annexure "COM3.2", clause 8, pp 1-37 and 1-38.
[13] p 1-123.

RESPONDENTS' CASE

[14] The defences raised by the respondents in their answering affidavit may be summarised as follows: -

> [a] The respondents contend that the deponent to Compass' founding affidavit, namely Ms Adel Walker, did not have the authority to depose to the founding affidavit;
>
> [b] They further contended that payment by the first respondent is not due as Compass did not make payment to the employer;
>
> [c] The respondents claim that the indemnity is contradictory as to when payment by the first respondent becomes due;
>
> [d] It is alleged that the suretyship is against public policy.

[15] I deal with each defence in my finding.

FINDING

Lack of authority

[16] Annexure "COM1" to the founding affidavit[14] states that Ms Varden is authorised to depose to affidavits in litigation matters on behalf of Compass, and in her absence, Ms Walker does.

[17] The respondents argue that the absence of Mr Varden is a condition precedent to Ms Walker deposing to the founding affidavit. Therefore, Ms Walker was required to state in the founding affidavit that Ms Varden was absent, resulting in Ms Walker deposing to the founding affidavit.

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[14] p 1-19.

[18] In reply Ms Walker denies the lack of authority, states that she is unable to recall whether Ms Varden was absent on the day Ms Walker was required to depose to the founding affidavit, but more importantly, states that the facts contained in the founding affidavit fall within her knowledge in that the claim instituted by the employer against Compass falls in her purview and personal knowledge. In any event, Ms Walker then attaches a further resolution to Compass' reply as annexure "COM7" authorising her to depose to any affidavit in any litigation matters involving Compass and specifically ratifying her authority to depose to the founding affidavit in this matter.[15]

[19] The approach to challenging authority has been developed by our courts. In this regard, it has been held that:[16] -

> *"… The regularity of arguments about the authority of a deponent [is] unnecessary and wasteful.*
> *A rule of court or a formal practice direction must be honoured despite any arbitrariness. It functions even when it lacks convincing logic or utility in its creation or in its survival. The present issue may be decided in accordance with principle without interference from constraining directives because there is now, ordinarily, no prescribed formula for proving authority either as a routine prerequisite for issuing an application or otherwise. See Administrator, Transvaal v Mponyane and Others 1990 (4) SA 407 (W); Brown v Oosthuizen en 'n Ander 1980 (2) SA 155 (O) at 162.*
> *The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. (Compare Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 752D-F and the authorities there quoted).*
> *The developed view, adopted in court rule 7(1), is that the risk is adequately*

[15] Replying affidavit: annexure "COM7", p 3-15.
[16] *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C - H.

managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the rule maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions."

[20] It is thus clear that it is not the deponent to an affidavit in motion proceedings who needs to be authorised by the party concerned, but it is the institution of proceedings and the prosecution thereof which must be authorised. Rule 7 of the Uniform Rules of Court provides a procedure for a respondent who challenges the authority of an attorney who instituted motion proceedings on behalf of an applicant. In circumstances where an attorney's authority to institute proceedings on behalf of an applicant is challenged, it is incumbent upon the respondent to avail itself of the procedure provided for in rule 7.[17]

[21] The rationale behind this approach has been concisely stated and that is that:[18] -

"… A party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, i.e. by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the

[17] *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at paragraph [19].
[18] *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at paragraph [16].

conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application…"

[22] The respondents in this matter did not avail themselves of the procedure set out in rule 7(1). In any event, insofar as it was necessary, a resolution ratifying Ms Walker's authority was attached to the replying papers and the respondents made no further issue by way of a supplementary affidavit. I accordingly find that there is no merit in this defence.

Payment by the first respondent not due

[23] The respondents contend that the counter-indemnity is contradictory as to when payment by the first respondent becomes due. Coupled with this argument, the respondents deny that the first respondent breached the building contract concluded between the first respondent and the employer.

[24] Lastly on this defence, the first respondent who deposed to the answering affidavit avers that it was specifically represented to him by a certain Tamuka Chikorov upon the conclusion of the counter-indemnity that the first respondent's liability to make payment would only arise upon Compass having made payment to the employer. The representation was thus material, so the argument goes, and induced the second respondent in concluding the counter-indemnity on behalf of the first respondent.

[25] It is trite that the onus of proof rests on the party who alleges the misrepresentation. The determination of the actionability of the misrepresentation will thus depend on whether the respondents have shown on a balance of probabilities that the misrepresentation was made and that it induced the contract.[19]

[26] The respondents failed to provide any details about the relationship between

[19] *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 236 - 238; see also *Dorklerk Investments (Pty) Ltd v Bhyat* 1980 (1) SA 443 (W) at 444F - G. As to materiality of facts and representation, a reliable résumé of our law is to be found in Christie, *The Law of Contract in South Africa* (6th edition) at 294 *et seq*.

this certain Tamuka Chikorov and Compass. In fact, no information regarding the circumstances surrounding this representation has been provided.

[27] It is apposite that the first respondent's allegation of misrepresentation only extends to the counter-indemnity, not to the suretyship. This is clear from paragraphs 18 and 19 of the answering affidavit.[20] Pertinently clause 1 of the deed of suretyship mirrors clause 1.2 of the indemnity and similarly provides that the sureties shall be jointly liable with the first respondent for the payment of the amount claimed by Compass, whether or not Compass has made payment of such amount.

[28] In addition, it has been held in *Slipknot Investments 777 (Pty) Ltd v Du Toit*[21] that a person who is induced to sign a suretyship agreement by fraud or misrepresentation of a third party that he is unaware of the nature of the document he is signing, will nevertheless be bound by the agreement if the lender is innocent and unaware of the surety's mistake. It is most certainly not the respondents' case that Compass was aware of the alleged misrepresentation.

[29] Further, in *Langeveld v Union Finance Holdings (Pty) Ltd*[22] the full court of this division held that there is a strong *praesumptio hominis* that anyone who had signed the document had the *animus* to enter into the transaction and this person was burdened with the onus of convincing the court that he had not in fact entered the transaction by virtue of the maxim *caveat subscriptor*. The second respondent describes himself as a businessperson at paragraph 1.1 of the answering affidavit. He is therefore not a *"babe-in-the-woods"* as referred to in Langeveld.

[30] Accordingly, I find that the respondents failed to discharge the onus to prove that the counter-indemnity was induced by misrepresentation. Even if a case was made out for misrepresentation, the respondents have a further difficulty. As already indicated, the defence of misrepresentation has only been raised against the counter-indemnity. The deed of suretyship provides at clause 7(a) that the deed shall be enforceable against the sureties in accordance with the tenor thereof,

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[20] Answering affidavit, pp 2-11 and 2-12.
[21] 2011 (4) SA 72 (SCA).
[22] 2007 (4) SA 572 (W).

notwithstanding that the indemnity may in any way be invalid or unenforceable against the first respondent. Therefore, on this basis also, the defence has no merit.

Contradictory terms of the counter-indemnity

[31] As a third defence, the respondents contend that clauses 1.2 and 2 of the counter-indemnity contain contradictory terms. Clause 1.2 provides that Compass may claim payment from the respondents whether or not Compass has made payment to the employer. Clause 2 provides that for purposes of any claim against the respondents, the vouchers or other evidence showing payment by Compass shall be *prima facie* evidence against them of the fact and the amount of their liability.

[32] Clauses 1.2 and 2 provide for two completely different scenarios. In terms of clause 1.2 Compass has not yet made payment to the employer, but is regardless entitled to claim payment from the respondents, whereas clause 2 facilitates an evidentiary burden where Compass has already made payment to the employer. Under the circumstances it therefore cannot be said that there is a contradiction between these two terms. If there is no contradiction, there can also be no great injustice that has been perpetrated against the respondents as alleged. In the premises, I do not find any merit in this defence either.

Suretyship against public policy

[33] The respondents allege that the provisions of clause 7(a) of the suretyship already referred to, is contrary to public policy in that it seeks to permit enforceability of the suretyship agreement despite the counter-indemnity being unenforceable.

[34] The courts have reaffirmed the concept of public policy as the appropriate instrument for dealing with contractual unfairness that cannot satisfactorily be handled by existing rules.[23]

[23] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [91], citing *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *De Beer v Keyser* 2002 (1) SA 827 (SCA) [22].

[35] It is now firmly established that in the words of Cameron JA in *Brisley v Drotsky*: -

> *"Public policy is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedom, non-racialism and non-sexism."*

[36] Brand JA took the opportunity in *South African Forestry Co Ltd v York Timbers Ltd*[24] to refer to *Brisley* and sum up: -

> *"… It was held by this court that, although abstract value such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty. After all, it has been said that fairness and justice, like beauty, often lie in the eye of the beholder. In addition, it was held in Brisley and Afrox Healthcare that - within the protective limit of public policy that the courts have carefully developed, and consequent judicial control of contractual performance and enforcement - constitutional values such as dignity, equality and freedom require that courts approach their task of striking down or declining to enforce contracts that parties have freely concluded, with perceptive restraint."*

[37] Finally, in *Barkhuizen v Napier*[25] the Constitutional Court held that: -

> *"… The proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of*

[24] 2005 (3) SA 323 (SCA) [27].
[25] 2007 (5) SA 323 (CC).

Rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, and at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."[26]

[38] The enquiry is twofold, namely: -

[a] firstly, whether the clause itself is unreasonable; and

[b] secondly, if the clause is unreasonable, whether it should be enforced given the circumstances preventing compliance with it.[27]

[39] The court elaborated on these two questions as follows: -

"The first question involves the weighing up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been fully and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity."

And further, as far as the second question is concerned: -

"Once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that in the circumstances of the case there was a good reason why there was a failure to comply."

[40] The words of caution uttered by Moseneke DCJ and Sachs J in the same case are instructive: -

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[26] Paragraphs [28] to [30].
[27] *Barkhuizen v Napier*, paragraph [56].

> *"Courts emphasize that it is the tendency of the clause to deprive the respondent of his right to judicial redress, which should be scrutinized for reasonableness. Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties. In effect, on the subjective approach that the majority judgment favours, identical stipulations could be good or bad in a manner that renders whimsical the reasonableness standard of public policy."*[28]

[41] The respondents have not advanced any evidence to support their bald allegation that clause 7(a) is against public policy. The deed of suretyship was freely and voluntarily entered into. There is no evidence before me to gainsay this fact. With regard to the first leg of the enquiry as held in *Barkhuizen*, I find that the clause is not against public policy. It is common cause that the respondents have not complied with the deed of suretyship and failed to make payment. Therefore their defence tested against the second leg of the enquiry, holds no water either.

No breach of the building contract

[42] As an additional defence, the respondents denied that the first respondent breached the terms of the building contract. They therefore contend that until this dispute is resolved, it would not be in the interest of justice and fairness to expect the respondents to make payment of the amount claimed.

[43] The respondents lose sight of the fact that there are three distinct relationships between the parties: -

> [a] Firstly, there is a relationship between the employer and the first respondent, which relationship is governed by the terms of the construction contract. It is common cause that Compass was not privy to this agreement;

[28] *Barkhuizen v Napier* paragraph [98].

[b] Secondly, there is a relationship between Compass and the employer, which relationship is governed by the terms of the guarantee; and

[c] Thirdly, there is a relationship between Compass and the respondents, which relationship is governed by the terms of the indemnities.

[44] It is clear from a reading of the founding papers that the cause of action brought by Compass is founded on the indemnities. The counter-indemnity renders the undertaking made by the first respondent an *"on demand guarantee"*.

[45] In these circumstances the underlying contractual relationship between the employer and the first respondent is irrelevant to the present application as *"on demand guarantees"* stand separately, independently and autonomously from the underlying contracts.[29]

[46] In all the circumstances I find that the respondents failed to disclose a defence to the applicant's claim and I find that the applicant has made out a proper case for the relief sought.

ORDER

I therefore make the following order: -

[1] The first, second and third respondents, jointly and severally, the one paying the others to be absolved, shall make payment to the applicant of: -

[a] The amount of R1,759,908.62; and

[b] Interest on the amount of R1,759,908.62 at a rate of 12.25 % per annum calculated from date of payment by the applicant to the employer (Ekurhuleni Metropolitan Municipality) until date of final payment;

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[29] *Compass Insurance Co Ltd v Hospitality Hotel Developments* 2012 (2) SA 537 (SCA) at paragraphs [14] and [15]; *Lombard Insurance Co v Landmark Holdings* 2010 (2) SA 86 (SCA) paragraph [20].

[c] The costs of this application on a scale as between attorney and client.

F BEZUIDENHOUT

ACTING JUDGE OF
THE HIGH COURT

DATE OF HEARING: **23 August 2021**
DATE OF JUDGMENT: **27 August 2021**

APPEARANCES:

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On behalf of respondents: No appearance.