IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 57348/13

DATE: 2014 November 7

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

ONE ON MAIN DEVELOPMENTS (PTY) LTD APPLICANT

(Reg No. 2007/010953/07)

V

INVESTEC PRIVATE BANK

A DIVISION OF INVESTEC LIMITED 1st RESPONDENT

(Reg No. 1969/004063/06)

ENGINEERED SYSTEMS SOLUTIONS (PTY) LTD 2nd RESPONDENT

(Reg No. 2004/024978/07)

JUDGMENT

MABUSE J:

[1] This matter conflates two applications, one an application for payment of money and the other a counter

application for an anti-dissipatory interdict against the Applicant. Having chosen to deal with the two applications singly, I will first deal in this judgment with the main application which is an application for payment of an amount of R700, 000.00 (Seven Hundred Thousand Rand).

[2] By notice of motion issued by the Registrar of this Court on 18 October 2013, the Applicant, a private company duly registered as such in accordance with the company statutes of this country seeks, against the First Respondent alternatively the Second Respondent, payment of the sum of R700, 000.00 (Seven Hundred Thousand Rand) and other ancillary relief ("the main application"). As the First Respondent has delivered a notice to abide and the concomitant Affidavit to Abide only the Second Respondent opposes the main application.

[3] The First Respondent is a company established as such in terms of the company laws of this country. It operates as a commercial bank in terms of the provisions of the Banks Act 94 of 1990 at 100 Greyston Drive, Sandown, Sandton, in the province of Gauteng. The First Respondent is a registered credit provider in terms of the provisions of the National Credit Act 34 of 2005. The Second Respondent is also a company registered as such in terms of the company statutes of this country with its registered office at 21 George Storrar Drive, Groenkloof, Pretoria.

[4] The Applicant's cause of action is based on a Letter of Guarantee (No. GU00040865) ("the guarantee") that the First Respondent issued on 30 May 2013. The said guarantee, a copy of which was attached as annexure "A4" to the founding affidavit, was issued in favour of the Applicant on instructions of the Second Respondent to make payment on behalf of the Second Respondent in the sum of R3, 506, 641.00 (Three Million Five Hundred and Six Thousand Six Hundred and Forty One Rand) upon the First Respondent being notified by the Second Respondent in writing of the registration of certain property transactions. This is what the said letter of guarantee provided, among others,:

> "*Letter of Guarantee No. GU00040865*
>
> *1. At the request of Loubser van der Walt Inc and on behalf of ENGINEERED SYSTEMS SOLUTIONS (PTY) LTD, we advise that we hold at your disposal the sum of R3,506,641.00 (three million five hundred and six thousand six hundred and forty one rand) to date of payment.*
>
> *2. This amount will be paid, free of exchange into the bank account, the details of which are reflected above, upon the receipt by us of advice in writing from Loubser van der Wait Inc of the registration of the following transactions in the appropriate Deed Registry: -*
>
> *2.1 Cancellation of all existing mortgage bonds over the property described as R/E*

Erf265 Nieuw Muckleneuk, R/E Erf266 in Nieuw Muckleneuk, PTN2 of Erf 266 Nieuw Muckleneuk, Unit 1 Nieuw Muckleneuk 1/236, Unit 2 Nieuw Muckleneuk 1/266;

2.2 Transfer of ownership of the property referred to in 2.1 above from ONE ON MAIN DEVELOPMENTS (PTY) LTD to ENGINEERED SYSTEMS SOLUTIONS (PTY) LTD.

3. Prior to registration, we reserve the right to withdraw from this undertaking by giving written notice thereof should any new or previously undisclosed fact emerged, or should any circumstances prevent or unduly delay the registration of any of the above mentioned matters, or should we receive written instructions to do so from our Client whereupon the said sum will no longer be at your disposal.

4. This letter of guarantee is neither negotiable nor transferable and must be returned to us against payment of the abovementioned sum.

5. This letter of guarantee shall expire six months after date of issue.

6. On the day of presentation please advise before 12:30 by using fax no. 0[...].

Yours faithfully

INVESTEC BANK LIMITED"

The bank account details that appeared in the said guarantee and reference of which was made in paragraph 2 of the said guarantee were as follows:

" *Bank: Standard Bank*

Brach: 012645

Credit Account: Philip Coetzer Incorporated

Credit Account: 4[...]

Payment Reference: One On Main. "

[5] The properties referred to in paragraph 2 of the guarantee were duly registered at the Deeds Office in Pretoria on 10 September 2013. This is not in dispute. After the registration of the said transaction in the Deeds Office and in particular on 10 September 2013, the Applicant's attorneys advised the Second Respondent's attorneys, Loubser Van der Walt Inc (" Loubser Van der Walt"), in writing accordingly that the

properties had been registered in the name of Engineered Systems Solutions (Pty) Ltd, the Second Respondent "*this morning, Thursday, 10 September 2013 in Pretoria Deeds Office."* In the same letter the Applicant's attorneys requested payment of the guarantee amount. Parts of the letter that the Applicant's attorneys wrote to the Second Respondent's attorneys on 10 September 2013 read as follows:

> "*OUR TRANSFER: ONE ON MAIN DEVELOPMENTS (PTY) LTD / ENGINEERED SYSTEMS SOLUTIONS (PTY) LTD*
>
> *1. REMAINING EXTENT OF ERF265 NIEUWMUCKLENEUK*
>
> *2. REMAINING EXTENT OF ERF265 NIEUW MUCKLENEUK*
>
> *3. PORTION 2 OF ERF266 NIEUW MUCKLENEUK*
>
> *4. PORTION 1 OF ERF 266 NIEUW MUCKLENEUK (FORMERL Y KNOWN AS UNIT 1 AND UNIT2 NIEU MUCKLENEUK 1/266)*
>
> *We refer to the above matter and confirm that the properties have been registered in the name of Engineered System Solutions (Pty) Ltd this morning Tuesday 10 September 2013 in the Deeds Office of Pretoria.*
>
> *We confirm that the bonds over the properties were cancelled on 21 June 2013. Kindly make urgent payment of the guarantee issued by Investec on 30 May 2013, which is attached hereto for your ease of reference. ''*

[6] The Second Respondent's attorneys failed respond to the said letter. No payment in accordance with the terms of the guarantee was made by the First Respondent either. On 13 September 2013 at 08h19, Loubser van der Walt wrote a letter to the First Respondent in which they instructed the First Respondent to cancel the aforesaid guarantee. The said letter reads, among others, as follows:

> "INVESTEC PRIVATE BANK
>
> GUARANTEES DEPARTMENT
>
> BY FAX: [...]
>
> REQUEST FOR CANCELLATION OF GUARANTEE NR GU00040865
>
> "*Find attached hereto guarantee no. GU00040865 in the amount of R3, 506,* 641.00 *(three million*

five hundred and six thousand six hundred and forty one rand).

We herewith request your offices to cancel the aforesaid guarantee.

We trust you find the same in order and await your confirmation of the cancellation of the guarantee.
"

Yours faithfully

LOUBSER VAN DER WALT"

[7] On the same date at 09h02 the Applicant's attorneys notified the First Respondent in writing that the transactions referred to in the guarantee had been registered. Parts of the said letter read, among others, as follows:

"BY FAX: [...]

13 September 2013

INVESTEC PRIVATE BANK

Our ref: E72/S Horn

Your Client no. 1100201106039

Your client: Engineered Systems Solutions (Pty) Ltd

URGENT

Dear Sirs

"OUR TRANSFER: ONE ON MAIN DEVELOPMENTS (PTY) LTD/ENGINEERED SYSTEMS SOLUTIONS (PTY) L TD

1. REMAINING EXTENT OF ERF265 NIEUWMUCKLENEUK

2. REMAINING EXTENT OF ERF265 NIEUW MUCKLENEUK

3. PORTION 2 OF ERF266 NIEUW MUCKLENEUK

4. PORTION 1 OF ERF 266 NIEUW MUCKLENEUK (FORMERL Y KNOWN AS UNIT 1

AND UNIT2 NIEU MUCKLENEUK 1/266)

We refer to the above matter and confirm that the properties have been registered in the name of Engineered Systems Solutions (Pty) Ltd on Tuesday 10 September 2013.

We confirm that the bonds over the properties were cancelled on 21 June 2013.

Kindly make urgent payment of the guarantee issued on 30 May 2013 with reference number GU00040865, which is attached hereto for your ease of Reference.

We also attach hereto a copy of the letter faxed and emailed to Loubser van der Walt attorneys on 10 September 2013 requesting them for payment of this guarantee.

Yours faithfully S Horn

Per: Philip Coetzer Inc".

[8] On 17 September 2013, long after the respondents had been notified by the applicant and long after the Loubser van der Walt should have notified the First Respondent about the registration of the properties in the Second Respondent's name, the First Respondent paid a sum of R2, 806, 641.00 into the bank account of the Applicant's attorneys. This too is not in dispute. This fact is evidenced by annexure "A5" to the founding affidavit which is a notice from First Respondent of payment of the amount of R2, 806, 641.00 (Two Million Eight Hundred And Six Thousand Six Hundred And Forty One Rand). Payment of this amount on 17 September 2013 was an electronic fund transfer made into the Applicant's attorneys' bank account. The aforementioned payment had a shortfall of R700, 000.00 (Seven Hundred Thousand Rand). At the foot of the aforementioned notice was the following note:

"*Should there be any problems with the payment detailed above please contact: Jan Adriaan van der Walt*

Day phone: [...]

Cell: [...]

E-mail: [...] "

Accordingly the sum of R700, 000.00 (Seven Hundred Thousand Rand) constitutes the difference between the sum of R3, 605,641.00 (Three Million Six Hundred And Five Thousand Six Hundred And Forty One Rand) referred to in the guarantee and the sum of R2, 806, 641.00 (Two Million Eight Hundred And Six

Thousand Six Hundred And Forty One Rand) that the First Respondent deposited into the Applicant's attorney's bank account on 17 September 2013. The First Respondent furnished no reasons at all for short payment.

[9] As a consequence of the aforementioned shortfall and in order to avoid any litigation, the Applicant launched an investigation aimed at establishing the reasons for the First Respondent's decision to pay only R2,806,641.00 (Two Million Eight Hundred And Six Thousand Six Hundred And Forty One Rand). The Applicant's attorneys wrote a letter to the First Respondent on 27 September 2013. In this letter the said attorneys firstly again reported to the First Respondent about registration of the relevant properties indicating also that there was compliance with the requirements of paragraph 2.1 of the guarantee; secondly, referred to the contents of paragraph 2 of the said guarantee; thirdly, pointed out that contrary to the First Respondent's undertaking contained in the said guarantee, the applicant had only been paid a sum of R2, 806, 641.00 (Two Million Eight Hundred And Six Thousand Six Hundred And Forty One Rand) as part payment and fourthly and lastly demanded payment of the balance of R700,000.00 (Seven Hundred Thousand Rand) by close of business day on 30 September 2013. They also threatened to take legal steps against the First Respondent in order to enforce compliance by the First Respondent with its undertaking as contained in the guarantee.

[10] By 11 October 2013 the First Respondent had neither paid the balance of R700, 000.00 (Seven Hundred Thousand Rand) nor responded to the Applicant's attorneys' letter dated 27 September 2013. The next step the Applicant's attorneys took was to send an electronic mail to the First Respondent on 11 October 2013. In the said electronic mail, the Applicant's attorneys noted with regret that they had not been favoured by the First Respondent with its response to their email dated 27 September 2013; secondly, they pointed out that they held instructions to commence litigation in order to recover the sum of R700, 000.00 (Seven Hundred Thousand Rand) if payment thereof was not made by close of business day on 14 October 2013. They also pointed out that in their litigation they would ask for costs on a punitive scale. Come 14 October 2013! There was neither a payment of the aforementioned balance by the First Respondent nor any response as a consequence of which on 18 October 2013 needless to say, the Applicant caused this application to be issued. A copy of the application was served on the First Respondent on 23 October 2013. On 29 October 2013 the First Respondent, through its attorneys, delivered a notice to abide. In the said notice to abide it was stated that the First Respondent abided by the judgment of the court and that the First Respondent did not oppose the application. Apart from delivering the said notice to abide, the First Respondent also delivered what it called an Abiding Affidavit.

[11] As pointed out earlier, the Applicant contended that its claim against both the First and Second Respondents was based on the facts aforegoing and on the short payment. In so far as it concerned the Second Respondent, the Applicant claims payment of the said amount of R700, 000.00 (Seven Hundred

Thousand Rand) from the Second Respondent on the basis furthermore of the following reasons. On 19 September 2012, the Applicant, as the seller, sold to the Second Respondent, as the purchaser, in Pretoria in a written agreement of sale the properties described in the guarantee, for R13,336,641.78 (Thirteen Million Three Hundred And Thirty Six Thousand Six Hundred And Forty One Rand And Seventy Eight Cents). A portion of the aforementioned purchase price was supposed to be covered by the Second Respondent securing a guarantee. The Second Respondent was obliged, in terms of the provisions of clause 4.3.2 of the said Agreement of Sale to procure, within 14 (fourteen) days after signature of the aforementioned Agreement of Sale, an unconditional guarantee for the balance of the purchase price, acceptable and payable to the Applicant and against registration of the transfer of the properties in favour of the Applicant. It is consequently for that reason that the Second Respondent instructed the First Respondent to issue the said letter of guarantee in favour of the Applicant towards the payment of part of the purchase price of the properties. The Second Respondent is accordingly obliged by the terms of the said agreement of sale to pay the said sum of R700, 000.00 (Seven Hundred Thousand Rand) as part payment of the purchase price.

[12] It is now clear from the proper reading of the guarantee that, after registration of the properties in the Deeds Registry, the First Respondent became obliged to make full payment of the entire amount reflected in the guarantee without unilaterally withholding any amount, not even on the instructions of the Second Respondent. There is no dispute furthermore that once the properties were registered and it was duly notified about such registration, the First Respondent's duty towards the Applicant was to pay the entire amount guarantee and not a portion of it only.

[13] As I have pointed out earlier, payment of the balance of R700, 000.00 (Seven Hundred Thousand Rand) constituted part of the obligations of the second respondent arising from the provisions of clause 4.3 of the Agreement of Sale. The Second Respondent had undertaken to pay the purchase on registration of the properties into the names of the Second Respondent. Payment of the purchase price by the Second Respondent as set out in clause 4.3 of the Agreement of Sale was subject to the terms of clause 4.4 of the same Agreement of Sale. In terms of clause 4.4 the second respondent had agreed and undertaken that all payments would be made at Pretoria free of bank, exchange and charges, and without any deduction or setoff whatsoever to the Applicant or at such other place within the municipal area of Pretoria as the Applicant might direct.

[14] I now turn to the reasons why the respondents failed to pay the amount of R700, 000.00 (Seven Hundred Thousand Rand). I will firstly deal with the First Respondent's reasons. The First Respondent's attitude was that its obligation to pay in terms of the guarantee arose only after Loubser van der Walt would have advised it in writing of the registration of the transactions referred to in paragraphs 2.1 and 2.2 of the guarantee. Secondly the First Respondent contended that it had reserved itself the right to withdraw from its undertaking

to pay prior to the registration on written instructions from the client upon which the said sum would no longer be held at the disposal of the Applicant. It is alleged by Shavonne Deleen McKee ("McKee"), who disposed to the First Respondent's Abiding Affidavit, that subject to the authorisation of the guarantee and the encumbrance of the funds the First Respondent was not advised at any time by Loubser van der Walt in any manner whatsoever that the transactions had been registered and that instead on 13 September 2013 the First Respondent received written instructions from the said Loubser van der Walt to cancel the guarantee.

[15] Attached to McKee's affidavit was indeed a copy of the letter from Loubser van der Walt marked Annexure "CDN2" in which the instruction to the First Respondent to cancel the guarantee was contained. The First Respondent contended that as a consequence of the instructions contained in CDN2 it cancelled the guarantee and lifted the encumbrance on the funds on 13 September 2013 as it had received such instructions and furthermore as it was obliged to execute on it. The First Respondent contended furthermore that it cancelled the guarantee on 13 September 2013 as it was completely unaware that the transfers had been registered. According to McKee's affidavit, Loubser van der Walt failed to inform it of the registration of the properties in the names of the Second Respondent. In paragraph 19 of the Abiding Affidavit McKee stated that the First Respondent would not have cancelled the guarantee (and more importantly lifted the encumbrance) thereby enabling the attorney to deal with the funds on the instructions of its clients, Loubser van der Walt, had it been aware of the fact that the transfers had in fact been registered.

[16] Finally, the First Respondent conceded that in view of the fact that the aforementioned properties had been registered in the Second Respondent's name, Loubser van der Walt were obliged to inform it in writing about the registration upon which it would have made payment in accordance with the terms of the guarantee. According to the First Respondent, the disputed amount of R700, 000.00 (Seven Hundred Thousand Rand) was still in its books of account. The relevant CCM section 78(2) sub-account has been blocked in accordance with the terms of the agreement concluded between the First Respondent and Loubser van der Walt.

[17] The First Respondent denied that it received Annexure "A7", which is a copy of a letter dated 27 September 2013 from the Applicant's attorneys to it. This letter was sent by telefax to fax no. 0861468468. Attached to a copy of the said Annexure "A7" was a copy of the transmission report of the said letter which

showed that transmission of a letter consisting of three pages to 0861468468 on 27 Sep 2013 at 10h32 was successful. I should indicate at this stage that the fax number 0861468468 is a facsimile number reflected on the guarantee. It appears in the contact details of the First Respondent. Accordingly I must rush to conclude, in the absence of any other evidence, that the fax number to which the Applicant's attorneys sent their letter dated 27 September 2013 belonged to the First Respondent and that therefore the letter was sent to the correct number.

[18] It is very important, in my view, to carefully analyse the wording of the letter of guarantee in order to establish its import and to determine its purpose. Of importance in the said guarantee firstly, is the following part of clause 2:

> " *This amount will be paid, free of exchange into the bank account, the details of which are reflected above, upon receipt by advice in writing from Loubser van der Wait Incorporated of the registration of the following transactions in the appropriate Deeds Registry..."*

[19] According to clause 2 of the letter of guarantee the First Respondent gave an equivocal undertaking to pay the whole sum of R3,506,641.00 (Three Million, Five Hundred And Six Thousand Six Hundred And Forty One Rand) and not part of it, into the Applicant's attorneys' bank account. Furthermore according to clause 2, and this is of paramount important and will indeed decide the extent of the First Respondent's duty, the First Respondent undertook to pay the said amount of R3, 506, 641.00 (Three Million Five Hundred And Six Thousand Six Hundred And Forty One Rand) only after Loubser van der Walt would have notified it in writing of the registration of the transactions mentioned in clause 2 of the guarantee. This is clear and unequivocal. If Loubser van der Walt did not notify the First Respondent in writing of the registration of the transaction, the First Respondent would not pay. By implication the First Respondent would not pay even if the written notification had emanated from the Applicant.

[20] The second important point is clause 3 of the said guarantee. This is the clause in which the First Respondent had reserved itself the right to withdraw the guarantee. The Court now knows that the First Respondent never exercised this right. Such withdrawal would only have taken place prior to the registration of the transaction in the Deeds Registry and by implication not after such registration. Even then the withdrawal of the guarantee would only take place under the following circumstances;

> (a) firstly, if any new or previously undisclosed fact emerged;
>
> (b) secondly, should any circumstance prevent or unduly delay the registration of any of the transactions referred to in clause 2 of the undertaking;
>
> (c) thirdly, should the Second Respondent instruct them to do so upon the happening of anyone of the events mentioned in clause 3. The funds would no longer be held at the disposal of the Applicant. The First Respondent would on cancellation arising from such events as mentioned *supra* lift the encumbrance on the funds.

[21] The Second Respondent's answering affidavit is contained in what the Second Respondent referred to as the Notice Of Motion: Counter Application. In the so-called document the Second Respondent seeks the following order:

"1. Judgement in fa vour of the Applicant for payment of the amount of R700, 000.00 (Seven Hundred Thousand Rands) be stayed/postponed, pending institution and final adjudication of an action by the Second Respondent;

2. In the alternative to prayer 1 above, that the amount of R700, 000.00 (Seven Hundred Thousand Rand) be held in trust by attorneys Loubser van der Wait Incorporated, and invested on an interest bearing account, pending the institution and final adjudication of an action by the Second Respondent;

3. That the Second Respondent be ordered to, within 30 days of date of this order, institutes this action against the Applicant, failing which this order will lapse;

4. That the Applicant be ordered to pay the costs of this counter application alternatively that the costs be reserved for determination in the action to be instituted as per prayer 3 supra.

And further ancillary relief. "

The said answering affidavit was deposed to by one Rui Nuno Andrade Ferreira ("Ferreira") the Second Respondent's project manager. In his affidavit, the said Ferreira contended that the First Respondent has made payment of all the amounts in terms of the written guarantee. He continued to state that the First Respondent has therefore made payment of the guarantee amount. The statement is incorrect and I choose to deal with in right away. The First Respondent has not made payment of all the amounts in terms of the written guarantee. The amount stated in the written guarantee was R3, 506, 641.00 (Three Million Five Hundred And Six Thousand Six Hundred And Forty One Rand). The First Respondent did not pay this amount. This amount of R3, 506, 641.00 (Three Million Five Hundred And Six Thousand Six Hundred And Forty One Rand) was the whole amount in terms of the written guarantee. It is also not correct that the First Respondent has made payment of the guarantee amount. The guarantee amount was R3, 506, 641.00 (three million, five hundred and six thousand six hundred and forty one rand) not less and not more. The respondent did not pay this amount.

[22] I now turn to the Second Respondent's reasons for opposing the Applicant's application. It is stated in the aforementioned affidavit that in terms of the aforementioned written Agreement of Sale concluded between the parties on 19 September 2013 the Applicant, as seller, would cause an effect transfer of the properties, described in the agreement and also in the guarantee after proclamation of the property. The parties acknowledged that the proclamation of the property could only take place after approval of a third development plan and consolidation of the properties. Accordingly the Applicant was responsible for the management of the process with the architects for the site development plan approval; secondly the

management of the process with the town planners for the proclamation approval and thirdly the site development plan approval. Further, according to the aforementioned Agreement of Sale the Applicant would be liable to pay interest on the initial amount of R9, 830, 000.00 (Nine Million Eight Hundred and Thirty Thousand Rand) at the rate of 6% per annum for any delay, following the three months from the date of payment thereof up to the date of completion of the "work share" of the Applicant, if such a delay of completion of the "work share" resulted from the Applicant's exclusive failure.

[23] It was contended by the Second Respondent that the Applicant failed to comply with its obligations in terms of the aforementioned written agreement and consequently breached it in the following manner. It failed to comply with its "work share" in that it failed to manage, alternatively, properly manage the process with the architects for the site development plan approval; secondly, it failed to manage, alternatively, properly manage the process with the town planners for proclamation approval; thirdly, it failed to obtain approval of the site development plan; fourthly, it failed to cause proclamation of the property; fifthly, it effected transfer of the properties to the Second Respondent before proclamation thereof; sixthly, the Applicant was and remained the sole cause for the delay of the approval of the site development plan, proclamation of the property and the transfer to the Second Respondent. It was furthermore contended by the said Ferreira that following the Applicant's failure to comply with the obligations in terms of the written agreement and persisting with such breach the Applicant was and remained liable towards the second respondent for the interest calculated in terms of clause 9.2 of the agreement from 22 December 2012 to date of approval of the site development plan and proclamation of the property anticipated to take place by the end of January 2014 in the total amount of R278,312.71 (Two Hundred And Seventy Eight Thousand Three Hundred And Twelve Rand And Seventy One Cents) and that the Applicant caused the Second Respondent to suffer damages in respect of escalation in the development costs as a consequence of the delay in the amount of R4,427,978.66 (Four Million Four Hundred And Twenty Seven Thousand Nine Hundred And Seventy Eight Rand And Sixty Six Cents). It is furthermore alleged that at the time of entering into the agreement it was within the contemplation of the parties that the Second Respondent would suffer damages as indicated above as a result of any undue delay.

[24] On the aforementioned basis the Second Respondent denied that it was liable towards the Applicant as its claim in respect of interest and damages by far exceeded the amount of the Applicant's claim. For the aforementioned reason the Applicant seeks an order in terms of which the Applicant's claim is dismissed, alternatively an order in terms of which the Applicant's claim is stayed in terms of the provisions of Rule 22(4) of the Uniform Rules of Court pending the institution by the Second Respondent and the determination of the Second Respondent's claims against the Applicant. In the alternative the Second Respondent would seek an order by way of a counter application that the amount of R700, 000.00 (Seven Hundred Thousand Rand) be retained in trust on an interest bearing trust account, pending the institution and finalisation of the

Second Respondent's claim referred to above on the grounds that the Applicant, apart from its claim against the Second Respondent, has no assets and/or financial means to satisfy the Second Respondent's claim against it and, secondly, that the Second Respondent has a reasonable apprehension and fears that the Applicant would dissipate the amount of R700, 000.00 (Seven Hundred Thousand Rand) to avoid payment of the Second Respondent's claims.

[25] It is the Second Respondent's case firstly, that in penalising the Applicant for the delay in the completion of the "work share" and in withholding payment of the said amount of R700, 000.00 (Seven Hundred Thousand Rand) it acted in accordance with the terms of clause 4.3.4 of the parties' aforementioned Agreement of Sale. The said agreement provides as follows:

> *"It is confirmed that the Parties anticipate the process, as described in clause 9.2 and Annexure A, to be completed within 3 (Three) months from the Signature Date. Should such delay be the due to the exclusive failure by the Seller, the Seller will be liable to pay interest on the initial amount stated in clause 4.3.1 above at a rate of 6% (Six Percent) per annum, calculated from the first day, following 3 (Three) months from the date of payment thereof, up to date of completion of the work share of the Seller. In this instance the Parties will agree the amount the amount payable and jointly sign an instruction to the Seller's attorney, instructing the aforementioned attorney with respect to the amount to be paid to the Purchaser from the proceeds of the of the guarantee mentioned in 4.3.2 above, upon date of registration and payment of the guarantee. "*

[26] It is clear that before the Second Respondent could invoke this penalty clause, it had to prove that:

> (i) the delay in the completion of the work share was occasioned by the exclusive failure of the Applicant;
>
> (ii) the parties had agreed the amount in lieu of the 6% interest per annum; and,
>
> (iii) that the Applicant and the Second Respondent have signed a written joint instruction authorising and holding the Applicant's attorneys, that is Philip Coetzer, to pay to the Second Respondent the agreed amount from the proceeds of the guarantee upon registration and payment of the guarantee.

Even if there was a delay in the work share, which the Applicant did not entirely admit, the Second Respondent has not proved the other two requirements of this penalty clause. The Second Respondent has not alleged and proved that the parties had agreed on a specific amount in lieu of the 6% penalty per annum on the initial amount of R9, 830, 000.00 (Nine Million Eight Hundred And Thirty Thousand Rand) nor had the Second respondent produced the written joint agreement signed by the Applicant and the Second Respondent in terms of which Philip Coetzer were duly instructed by the said parties to pay an amount in lieu of the 6%

penalty from the proceeds of the guarantee. The Second Respondent has no right to retain or to refuse to pay the said amount of R700, 000.00 (seven hundred thousand rand) on this basis.

[27] The Second Respondent has another problem to deal with. The problem is clause 4.4 of the parties' Agreement of Sale which prohibited it from deducting any amount or setting of any amount from any payment that the Second Respondent was obliged to make towards the purchase price.

[28] Before dealing with the Second Respondent's anti-dissipatory application I wish to revert to the First Respondent and the letter of guarantee. What the letter of guarantee meant was that once the Loubser Van der Walt became aware either by being notified in writing by the Applicant or otherwise of the registration of the properties in the names of the Second Respondent, they no longer had any power to instruct the First Respondent to cancel the guarantee. I agree with the argument of Mr De Beer, the applicant's counsel, that the guarantee could only be withdrawn prior to the registration of the properties and that if it was done thereafter it was illegal. That right or power to cancel the guarantee belonged to them only before the registration of the properties in the names of the Second Respondent. Secondly, once the said attorneys were advised that the properties had been registered in the names of the Second Respondent they had the duty to inform the First Respondent accordingly so that the First Respondent could make payment of the purchase price in accordance with the terms of the guarantee. Accordingly the instruction that Loubser van der Walt gave to the First Respondent to cancel the guarantee was unlawful, void and of no effect.

[29] There is, in my view, sufficient evidence on which this court may infer that there was collusion between the First and Second Respondents to frustrate the operation of the guarantee. I make this observation on the following grounds. Loubser van der Walt were informed in writing by the Applicant's attorneys on 10 September 2013 that the properties involved had been registered in the Second Respondent's name. It is evident from the correspondence in the matter that they failed to inform the First Respondent as enjoined by the guarantee that the properties have been registered in the Second Respondent's names. Once they were notified about the registration of the property, Loubser van der Walt ceased to have any right to give instructions about the guarantee amount. They instead waited until 13 September 2013 on which date they instructed the First Respondent to cancel the guarantee. They no longer had powers to give such instructions on the said date.

[30] On the same date Loubser van der Walt had instructed the First Respondent to cancel the guarantee, the Applicant in writing informed the First Respondent about the registration of the properties in the Second Respondent's names. I already have pointed out that Loubser van der Walt had furnished no reasons whatsoever for the cancellation of the guarantee. The First Respondent, unaware that the properties had been registered in the names of the Second Respondent, so it claims, and unaware furthermore that Loubser van der Walt no longer had any authority to instruct them to cancel the guarantee, duly obliged and cancelled the

guarantee. The aforementioned cancellation of the guarantee was accordingly done on unlawful instructions. What compounds the respondents' cases is the following. The First Respondent was instructed to cancel the guarantee. Instead of doing so, on 17 September 2013 the First Respondent inexplicably made part payment of the sum of R2,806,441.00 (Two Million Eight Hundred And Six Thousand Four Hundred And Forty One Rand) into the bank account the details of which appeared on the guarantee. The letter from Loubser van der Walt instructed the First Respondent to cancel the guarantee. It contained no further instructions about the part payment of the aforementioned amount. It also contained no further instructions about the retention of the balance of R700, 000.00 (Seven Hundred Thousand Rand). Neither the First Respondent nor the Second Respondent has furnished any explanation about the circumstances under which part payment was made and the balance of R700, 000.00 (Seven Hundred Thousand Rand) retained. By trying to put the blame on the Second Respondent on these facts the First Respondent, in my view, is trying to run with the hare and hunt with the hound. Clearly there is more to this payment than meets the eye. The respondents want this court and the applicant to believe that the moon is made of green cheese. I am strongly of the view that both respondents have been less than candid in explaining the situation. It is on this basis that I strongly hold the view that there was collusion between the first and the Second Respondents. I deal with this situation fully when I deal with costs in paragraph 34 below.

[31] In the circumstances there is, in my view, no reason for this court to consider the Second Respondent's counter application. It lacks merit and has not been brought on bona fide grounds.

[32] The applicant has asked for a penal award of costs against the First and Second Respondents. The reasons for the said application by the applicant are said to be fraud on the part of the respondents. It is contended by the applicant that such fraud consisted in the respondents colluding not to honour the guarantee. The law regarding the award of costs on attorney and client scale has been set out in numerous authorities among them, Nel v. Waterberg Landbouwas Ko-operatiewe Vereeniging 1946 A D 597 at 607 where the Court stated that:

> ' *The true explanation of awards of attorney and client costs not expressly provided by Statute seems to be that, by reason of special considerations arising either from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party, will not be out of pocket in respect of the expense caused by the litigation. "*

[33] Absence of bona fides in conducting litigation, see in this regard Suzman Ltd v. Pather & Sons 1957 (4) S A 690 (D), a defendant's fraudulent conduct in connection with the subject matter of the proceedings, see in this **regard Nel v. Waterberg Landbouwas Ko-operatiewe Vereniging 1946 A D 597 at 609**, dishonesty in the conduct of the proceedings, for example tendering false evidence or concocting a case, see

in this respect **Moosa v. Mohamed 1939 TPD 271 at 281**, may singularly constitute grounds for awarding costs on attorney and client scale against a party.

[34] The defence raised by the first Respondent in paragraph 19 of its Abiding Affidavit is, in my view, not bona fide. The following are the reasons for my view. The First Respondent furnished no reasons whatsoever why it made part payment of the guarantee amount more importantly:

> 34.1 when it had not been notified about the registrations of the properties in the Second Respondent's names;
>
> 34.2 after it had received specific instructions to cancel the guarantee;
>
> 34.3 when it had not been specifically instructed to make part payment;
>
> 34.4 when it had received no specific instructions to retain a portion of the guarantee amount;
>
> 34.5 why it defied the Second Respondent's instructions to cancel the guarantee; and
>
> 34.6 its deafening silence in explaining the circumstances around the part payment and retention of part of the guarantee amount.

In the words of Holmes J, in Suzman Ltd v. Pather And Sons supra at p.690H the defence raised by the First Respondent was " *dilatory and not bona fide, and I think this is a proper case for an award of costs on the attorney and client scale.''* Holmes J, cited with approval the following passage from Munsamy v. Dosa 1949 (2) P.H. F85:

> *"The time has come when the court will exercise its power to order defendant who put up a false defence to pay attorney and client costs. "*

[35] I hold the view that the respondents were dishonest in the conduct of their litigation in placing before court false evidence. Furthermore I find that the respondents acted fraudulently in dealing with the guarantee and that the Second Respondent in particular was not bona fide in launching a counterapplication for the anti-dissipatory order. There are accordingly sufficient grounds in my view to grant the applicant's application for a penal order of costs.

[36] Finally there was an attempt by the second Respondent to hand into Court and utilise an affidavit that had referred to some correspondence. Mr De Beer objected to the introduction of the said affidavit and its use on the ground firstly, that the Second Respondent had not sought and obtained leave of the Court to file a further affidavit. The court could not allow the said affidavit as it would have entailed having to postpone the

matter.

[37] In the result I make the following order:

1. The application for payment of a sum of R700, 000.00 is hereby granted.

2. The First and Second Respondents are hereby ordered to pay the applicant, the one paying and the other to be absolved,;

2.1 the sum of R700, 000.00;

2.2 costs of the applicant's application on attorney and client scale;

2.3 interest on the said sum of R700, 000.00 at the rate of 15.5% per annum commencing from 10 September 2013 to date of payment;

3. The Second Respondent's counter application is hereby dismissed with costs on attorney and client scale; and

4. The Second Respondent is hereby ordered to pay the Applicant's wasted costs of 6 January 2014.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv. De Beer

Instructed by: Philip Coetzer Inc.

Counsel for the respondents: Adv. MM Rip (SC)

Instructed by: Van der Merwe du Toit Inc.

Date Heard: 20 August 2014

Date of Judgment: 2014 November 7